UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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CAMBRIDGE MEDICAL, P.C.,

Plaintiff,

-against-

ALLSTATE INSURANCE COMPANY, ALLSTATE INDEMNITY COMPANY and ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY

Defendants.

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ALLSTATE INSURANCE COMPANY, ALLSTATE INDEMNITY COMPANY and ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY,

Defendants and Third Party Plaintiffs

-against-

PINE HOLLOW MEDICAL, P.C. MARK J. LEVITAN, EILEEN S. DEBBI, M.D., F. SCOTT NOWAKOWSKI, M.D., NICHOLAS M. JONES, D.O., SCOTT A. JONES, D.O., ALEXANDRA PERKINS, M.D., DOMINIC JUDE RUBINO, D.C., FRANK MANDARINO, D.C., JASON SCOTT BRATTNER, D.C., RONALD MAZZA, D.C., MICHAEL A. BERSTEIN, D.C.,JONATHAN TEPPER, D.C., WALTER MENDOZA, D.C., BROOKLYN CHIROPRACTIC ASSOCIATES P.C., BRONX CHIROPRACTIC ASSOCIATES, P.C., STATEN ISLAND CHIROPRACTIC ASSOCIATES, P.C., COMPLETE CHIROPRACTIC, P.C., QUEENS CHIROPRACTIC ASSOCIATES, P.C., RONALD MAZZA, D.C., P.C., WALTER MENDOZA CHIROPRACTOR, P.C., MICHAEL A. BERNSTEIN, D.C., P.C., JOHN DOES 1 and 2 and ABC CORPS. 1 and 2

Third Party Defendants.

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Case No:
2:11-cv-04044-LDW-ETB

ATTORNEY'S AFFIRMATION IN OPPOSITION TO PLAINTIFF'S AND THIRD-PARTY DEFENDANTS' MOTION TO DISMISS

State of New York)
)ss.:
County of New York)

Randall K. Roonan, Esq., an attorney duly licensed to practice law before the Courts of the State of New York, affirms the following statements to be true under the penalties of perjury:

1. I am an Associate with the Law Offices of Short & Billy, P.C., attorneys for the Defendant and Third-party Plaintiffs ALLSTATE INSURANCE COMPANY, ALLSTATE INDEMNITY COMPANY and ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY [hereinafter collectively referred to as "ALLSTATE"]. I submit this affirmation in opposition to the Plaintiff and Third-party Defendants' Motions to Dismiss. I make this affirmation based upon my review of the files maintained by my office and upon information and belief.

2. This lawsuit involves, inter alia, ALLSTATES claims in their Answer, Counterclaims and Third-party Complaint against the Plaintiff and the moving Third-party Defendants for recovery of No-fault medical benefits paid under the Insurance Laws of New York State for fraudulent claims.

3. A true and accurate copy of the New York State Senate Notice of Public Hearing dated February 4, 2010, discussing "fraud and abuse of [New York's] no-fault system" is annexed hereto as Exhibit 1.

4. A true and accurate copy of the Department of Financial Services March 15, 2012 annual report on health care fraud the New York State Insurance department is annexed hereto as Exhibit 2.

5. A true and accurate copy of a Department of Financial Services proposal of the Fourth Amendment to 11 NYCRR 65-3 (Insurance Regulation No. 68-C) is attached, as Exhibit 3.

6. A true and accurate copy is attached, as Exhibit 4, of Governor Cuomo's press release dated May 1st, 2012, which regarded the proposed amendments to end no-fault fraud.

7. A true and accurate copy of the New York State Insurance Department's Opinion Letter dated November 29, 2000 is attached as Exhibit 5.

8. Attached, as Exhibit 6, is a true and accurate copy of the Court's decision, dated May 16, 2011, in Cambridge Medical PC. v. Allstate Ins. Co. (CV-068211/09 Civ. Ct. Cty. Of N.Y., N.Y. County)

9. Attached, as Exhibit 7, are true and accurate copies of screen shots from www.bakesanders.com, the website of the law firm of Baker, Sanders, Barshay, Grossman, Fass, Muhlstock & Neuwirth, LLC describing the firm's practice and containing Steven J. Neuwirth, Esq.'s biography.

10. Attached, as Exhibit 8, are true and accurate copies of the trial memorandums of law submitted in two Cambridge cases with Allstate.

11. Attached, as Exhibit 9 are true and accurate copies of three decisions of Judge Moulton dated October 11th, 2011 and October 12th, 2011.

12. Attached, as Exhibit 10, is a true and accurate copy of Judge Samuels' Decision in Matrangolo a/o Infuso(CV-012997-09); a/o Fanelli(CV-050716); a/o Jackson (CV-012988-09); a/o Muscara (CV-012992-09) v. Allstate (noted in her comments on page 29 of the trial transcript).

13. Attached, as Exhibit 11, is a true and accurate copy of the decision in Dr. Stephen Matrangolo, D.C., P.C. and David Fitzhugh v Progressive Casualty Ins. Company.

14. Attached, as Exhibit 12, are true and accurate copies of the Arbitration Awards in Optimum/Monteleone v Geico and Optimum /Rosario v Geico and Optimum/Rosario v. Allstate.

WHEREFORE, Defendant and Third-party Plaintiffs, ALLSTATE INSURANCE COMPANY, ALLSTATE INDEMNITY COMPANY and ALLSTATEPROPERTY AND CASUALTY INSURANCE COMPANY respectfully request that the Plaintiff and Third-party defendants' Motion to Dismiss be denied in its entirety, and such other and further relief as this Court deems just and proper.

Dated: June 20, 2012

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EXHIBIT 1

New York State Senate

Notice of Public Hearing

Senate Standing Committee on Insurance

Neil D. Breslin, Chair

SUBJECT: No-fault Fraud in New York State

PURPOSE: The purpose of this hearing is to (1) identify the fundamental causes of no-fault fraud; (2) determine why there has been an apparent increase in no-fault fraud in recent years; (3) better understand how no-fault fraud is perpetrated; and (4) to explore potential solutions to reduce the incidences of no-fault fraud in New York State.

February 4th, 2010

10:00 a.m.

Hearing Room A

Legislative Office Building

Albany, New York

The costs of fraud and abuse of the state's no-fault system is ultimately borne by New York's honest policyholders. During the past five years New York's auto insurers have seen a 56 percent increase in the average cost of no-fault claims, which according to many experts is the result of fraud and abuse of the no-fault system in New York. According to the Insurance Information Institute, New York's auto insurers saw their typical no-fault payment for the medical care of accident victims rise from approximately $5,615 per claim in 2004 to approximately $8,748 per claim in 2009. It is estimated that a significant percentage of each individuals automobile insurance premium can be contributed to insurance fraud.

The Committee would like to hear from representatives from government, insurance industry, and advocates.

Persons wishing to present pertinent testimony to the Committee at this public hearing should complete and return the enclosed reply form as soon as possible. ***Oral testimony is by invitation only.*** Fifteen copies of any prepared testimony should be submitted at the hearing registration desk. Written testimony will also be accepted and may be sent to the contact person listed on the reply form. In order to publicize the hearing further, please inform interested parties of the Committee's interest in receiving written testimony from all sources.

In order to meet the needs of those who may have a disability, the Senate, in accordance with their policy of non-discrimination on the bases of disability, as well as the 1990 Americans with Disabilities Act (ADA), has made its facilities and services available to all individuals with disabilities. For individuals with disabilities, accommodations will be provided, upon reasonable request, to afford such individuals access and admission to Senate and Assembly facilities and activities.

EXHIBIT 2

New York State Department of Financial Services Annual Report on the Activities of the Department to Investigate and Combat Health Insurance Fraud

As required by § 409(c) of the Financial Services Law

Report to the Governor, the Comptroller, the Attorney General, the President Pro Tem of the Senate, the Speaker of the Assembly, and the Chairpersons of the Senate Finance and Health Committees and the Assembly Ways and Means and Health Committees

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March 15, 2012

Benjamin M. Lawsky
Superintendent
New York State Department of Financial Services

NEW YORK STATE
DEPARTMENT *of*
FINANCIAL SERVICES

Andrew M. Cuomo
Governor

Benjamin M. Lawsky
Superintendent

March 15, 2012

Dear Governor Cuomo, Comptroller DiNapoli, Attorney General Schneiderman, President Pro Tem Skelos, Speaker Silver, Chairman DeFrancisco, Chairman Hannon, Chairman Farrell, and Chairman Gottfried:

On behalf of the Department of Financial Services ("the Department"), I hereby submit this report required by Section 409 (c) of the Financial Services Law summarizing the Department's activities to investigate and combat health insurance fraud.

As you will see, this report highlights the importance of fighting no-fault fraud. Reports of no-fault fraud totaled 85 percent of health insurance fraud reports and more than half of reports of fraud of all types. In sum, it is the biggest single fraud issue faced by the Department.

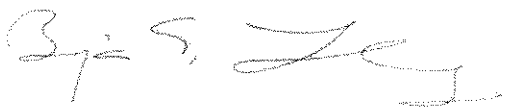
That is why Governor Cuomo directed the Department to launch a statewide initiative to stop deceptive doctors and shut down medical mills that plague New York's no-fault insurance payment system and cost New Yorkers hundreds of millions of dollars in insurance costs.

The Department has also sent demands for information to 135 medical providers whose billing practices have raised concerns regarding possible no-fault fraud.

This report highlights some of the major investigations undertaken during 2011, including a number of investigations conducted jointly with fellow law enforcement agencies. These investigations resulted in the arrests and prosecutions of individuals whose schemes were responsible for millions of dollars of fraudulent claims to insurance companies. Overall, investigations by the Department led to 210 arrests for health care fraud in 2011.

In the coming year, the Department and its Financial Frauds and Consumer Protection Division (FFCPD) look forward to continuing to work closely with all our partners to aggressively combat health care fraud.

Respectfully submitted,



Benjamin M. Lawsky
Superintendent of Financial Services

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EXECUTIVE SUMMARY

Through the enactment of the Financial Services Law, the Banking and Insurance Departments were merged into a single Department of Financial Services ("DFS") which began operating on October 3, 2011. The merger was proposed as a way to establish a single regulatory agency with a broad overview of the entire range of financial services, as well as to capitalize on efficiencies through government restructuring. To that end, DFS is tasked with consolidating regulatory and non-regulatory functions and working to identify ways to become a more efficient and effective regulator. The Financial Services Law created a new Financial Frauds and Consumer Protection Division, which includes the Insurance Frauds Bureau of the former Insurance Department.

This report, required under Section 409(c) of the Financial Services Law, summarizes the activities of the Department in combating health insurance fraud during 2011.

PURPOSE OF THIS REPORT

Fin. Serv. L. § 409(c) provides:

> No later than March fifteenth of each year, beginning in two thousand twelve, the superintendent shall furnish to the governor, the state comptroller, the attorney general, the temporary president of the senate, the speaker of the assembly, the chairpersons of the senate finance and health committees, and the assembly ways and means and health committees, a report summarizing the department's activities to investigate and combat health insurance fraud including information regarding referrals received, investigations initiated, investigations completed, and any other material necessary or desirable to evaluate the department's efforts.

Health Care Fraud
2011 Highlights

- Effective October 3, 2011, the New York State Insurance Department and the New York State Banking Department merged into a new agency – the Department of Financial Services (DFS).

- DFS's Financial Frauds and Consumer Protection Division's (FFCPD) Criminal Investigations Unit includes what was the Insurance Frauds Bureau, which had been part of the Insurance Department.

- The Department's FFCPD investigates and combats health care fraud, which includes three major types of insurance: accident and health, private disability and no-fault.

- Health care fraud investigations conducted by the Department resulted in 210 arrests, up 32 percent from the 159 arrests in 2010.

- The Department received 14,033 reports of suspected health care fraud including 1,915 involving accident and health insurance, 144 involving disability insurance and 11,974 involving no-fault.

- Reports of suspected no-fault fraud accounted for 51% of a total of 23,422 reports of all types of fraud received during the year.

- The Department's FFCPD and other members of the Drug Enforcement Administration Tactical Diversion Task Force made 47 arrests in 18 investigations.

I. Insurance Frauds and the Departmental of Financial Services

A. Merger of the Insurance and Banking Departments

Governor Andrew Cuomo announced his plan to create the Department of Financial Services (DFS) by merging the New York State Insurance Department and the New York State Banking Department in his 2011 State of the State address. The new Department is designed to better regulate modern financial services organizations. By combining the Insurance and Banking Departments into a unified financial regulator, the new Department of Financial Services will be a more efficient, modern, and comprehensive regulator of the financial sector.

Superintendent of Financial Services Benjamin M. Lawsky set the mission and announced the structure for the Department. He summarized the three main goals of the DFS to be "keeping New York on the cutting edge as the financial capital of the world, protecting consumers better than ever before, and serving as a model of efficient government." Superintendent Lawsky described the structure of the new Department's five main divisions: The Insurance Division; the Banking Division; the Financial Frauds and Consumer Protection Division; the Real Estate Division; and the Capital Markets Division.

The Department's new Financial Frauds and Consumer Protection Division is headquartered in New York City, with an office in Mineola and five offices across the upstate region: Albany, Syracuse, Rochester, Buffalo and Oneonta. The Department has a longstanding commitment to combating insurance fraud. That commitment will continue and the Department will strive to serve the people of New York State with dedication, professionalism and distinction.

B. Health Care Fraud[1]

The Department investigates insurance fraud, including health care fraud, throughout New York State. Health care fraud involves three major types of insurance: accident and health, private disability and no-fault.

1. Types of Health Care Fraud

Department investigators work closely with the insurance industry and law enforcement agencies on the federal, state and local levels to combat health care fraud schemes. Such schemes increase insurance premiums for all consumers.

[1] The other areas of insurance fraud that the Department investigates are discussed in a separate report entitled "The New York State Department of Financial Services Report on the Activities of the Financial Frauds and Consumer Protection Division" as required by Section 409(b) of the Financial Services Law.

The following are some of the more common types of health care fraud.

- Pharmaceutical fraud;
- Billing for services that were never rendered;
- Billing for more expensive procedures than were actually provided, commonly known as upcoding;
- Performing medically unnecessary treatments and expensive diagnostic tests for the purpose of generating insurance payments;
- Misrepresenting non-covered treatments as medically necessary covered treatments, e.g., cosmetic nose surgery billed as deviated septum repairs;
- Unbundling, i.e., billing as if each step of a procedure were a separate procedure;
- Staging/causing auto accidents;
- Filing no-fault claims for nonexistent injuries;
- Filing false or exaggerated medical disability claims;
- Staging fake slip-and-fall accidents; and
- Accepting kickbacks for patient referrals.

A review of health care fraud reports received by the Department in 2011 showed a year-to-year increase in allegations of pharmaceutical fraud and/or diversion of controlled substances, as did the incidence of medically unnecessary treatments and expensive diagnostic tests. Reports of other types of health care fraud, such as upcoding, billing for services not provided and filing no-fault claims for nonexistent injuries, while abundant, remained steady during 2011.

2. The Costs of Health Care Fraud

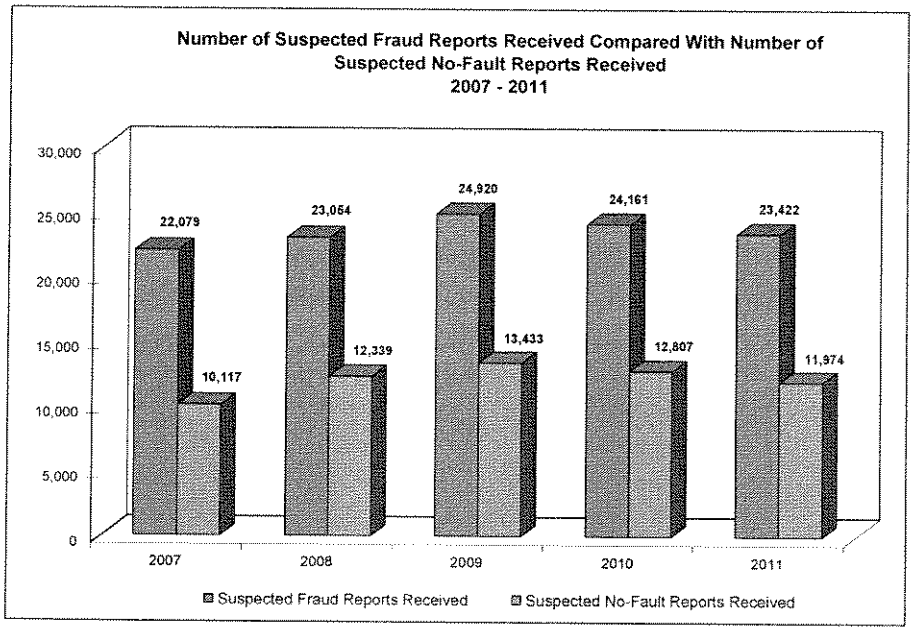
Health care fraud is a costly and pervasive drain on the national health care system. Though experts vary in their estimates, all agree that the costs of health care fraud are exorbitant. According to the National Health Care Anti-Fraud Association (NHCAA), fraud wastes at least 3 percent of all health care spending each year and may waste as much as 10 percent. The NHCAA estimates that the financial losses due to health care fraud are in the tens of billions of dollars annually. Combating fraud and abuse helps rein in the escalating costs of health care in the United States.

3. No-Fault Fraud

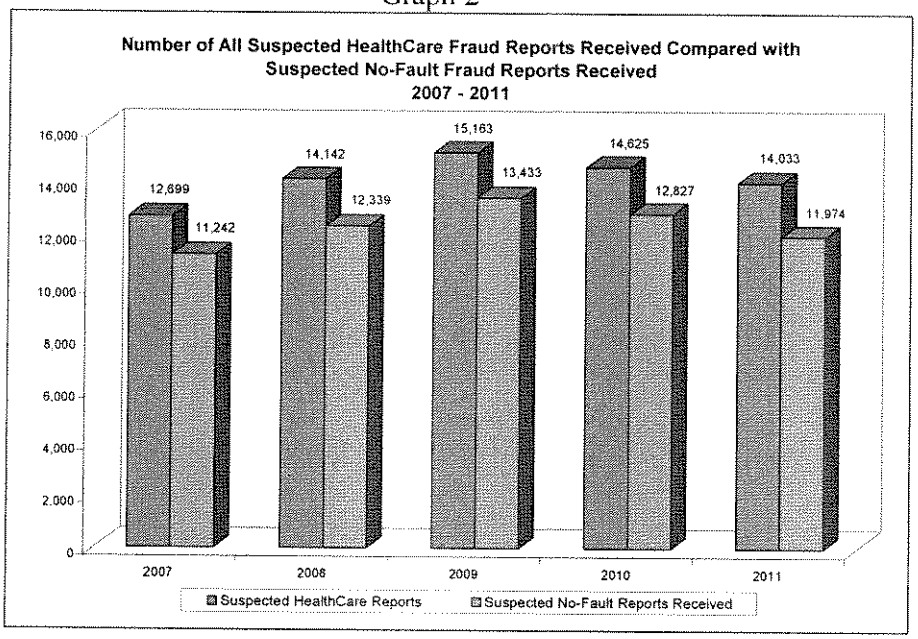
The number of suspected no-fault fraud reports received by the Department began to rise in 2007 and there were small year-to-year increases through 2009. Such reports declined in both 2010 and 2011, totaling 11,974 in the most recent year reported. In 2011, suspected no-fault fraud reports accounted for 51% of all fraud reports received by the Bureau.

The number of suspected no-fault fraud reports made up 85% of all health care fraud reports in 2011 and have accounted for upwards of 85% of total health care fraud reports since at least 2007.

Graph 1



Graph 2



New Yorkers pay 53% more than the national average for auto insurance premiums, making the State the fourth most expensive for such costs. Combating no-fault fraud is an essential component in mitigating these significant costs, and the Department is committed to rooting out and preventing no-fault fraud and all other types of health insurance fraud.

The Department will continue to take an aggressive proactive approach with regard to its efforts to combat no-fault insurance fraud. No-fault fraud is often perpetrated by complex

enterprises that consist of corrupt medical providers and attorneys. Earlier this month, Governor Cuomo announced a statewide initiative to stop deceptive medical providers and shut down medical mills that plague New York's no-fault insurance payment system and cost New Yorkers hundreds of millions of dollars in insurance costs. The initiative has two parts: 1) the Department issued a new regulation that will enable it to ban medical providers who engage in fraudulent and deceptive practices as part of the no-fault system. The regulation implements a 2005 law that gives DFS the power to regulate medical provider participation in the no-fault system, and 2) as part of an ongoing investigation, the Department is sending letters to 135 medical providers, identified through audits as well as information from law enforcement and insurance companies, whose billing practices have raised concerns regarding possible no-fault fraud and demanding information regarding their corporate structures, payment requests, and their direct participation in the practice. Any provider who refuses to respond to the Department's letters may be banned from participating in the no-fault system.

II. Collaborative Efforts to Combat Health Care Fraud

The FFCPD's Insurance Frauds Bureau is a member of several task forces and working groups designed to foster cooperation and communication among the many law enforcement agencies involved in combating health care fraud. Participation provides the opportunity to plan joint investigations, share information and hone investigative skills. To that end, several of the Bureau's investigators have been assigned to these groups and partner with other members in investigating cases involving health care fraud. Among the groups of which the Bureau is a member are the following:

- Western New York Health Care Fraud Task Force
- Central New York Health Care Fraud Working Group
- FBI/U.S. Attorney Health Care Fraud Working Group
- FBI New York Health Care Fraud Task Force
- National Insurance Crime Bureau Medical Working Groups
- Medicare Fraud Strike Force
- Drug Enforcement Administration Tactical Diversion Task Force (Upstate/Downstate)

A. Drug Enforcement Administration Tactical Diversion Task Force

The FFCPD's Insurance Frauds Bureau has been a member of the Albany-based Drug Enforcement Administration Tactical Diversion Task Force (UTDTF) since February 2011 when an investigator was assigned to work side-by-side with the Task Force's other members. The Task Force investigates organized drug diversion schemes, "doctor shopping" and forgery of controlled substance prescriptions. The Task Force made 47 arrests as a result of the successful investigation of 18 cases in 2011. Due to the success of the UTDTF, Frauds Bureau recently joined a similar task force in the downstate area that is focused on the same problem.

B. Medicare Fraud Strike Force

The Medicare Fraud Strike Force, coordinated jointly by the Department of Justice and the Department of Health and Human Services, is a multi-agency team of federal, state and local law enforcement agencies that combats fraud by analyzing data and putting an increased focus on community policing. The Strike Force is part of the Health Care Fraud Prevention and Enforcement Action Team (HEAT), created in May 2009 to prevent and deter fraud and enforce current anti-fraud laws.

Since the inception of operations in March 2007, Strike Force operations in nine cities, including New York, have charged more than 1,140 defendants who collectively fraudulently billed the Medicare program for more than $2.9 billion. Moreover, the HHS Centers for Medicare and Medicaid Services, working in conjunction with its Office of the Inspector General, are taking steps to increase accountability and decrease the presence of fraudulent providers.

C. Western New York Health Care Fraud Task Force

The Western New York Health Care Fraud Task Force works closely with state and local law enforcement agencies and the insurance industry to combat widespread fraud in the health care industry. In addition to the FFCPD's Insurance Frauds Bureau, Task Force members include the FBI, the U.S. Department of Health and Human Services' Office of the Inspector General, the IRS, and the U.S. Postal Service, among others. Investigations by the Task Force led to convictions and sentencing in two cases in 2011. In one case, a Buffalo podiatrist was sentenced to six months in federal prison, one year of supervised release and restitution of $36,869 after pleading guilty to one count of theft in connection with health care fraud. In the second case, an Orleans County pediatrician was sentenced to five years' probation, 200 hours of community service and $260,877 in restitution. He received free vaccines meant for Medicaid patients, dispensed them to non-Medicaid patients and billed their private insurers. Both cases are summarized in Section IV. A of this Report.

D. Other Group Participation

The Bureau also actively participates in the FBI New York Health Care Fraud Task Force, the National Insurance Crime Bureau Medical Working Group and the Central New York Health Care Fraud Working Group. Participation provides the opportunity for studying trends, planning strategies and conducting joint investigations.

III. Reporting and Preventing Insurance Fraud

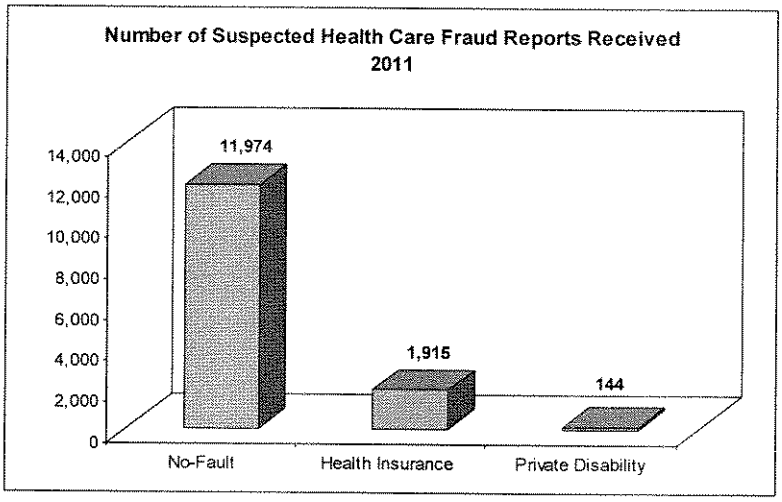
A. Insurance Company Reporting

Insurers are required by Section 405 of the Insurance Law to report suspected fraud to the Department. The Department has a Web-based Case Management System, known as FCMS, that allows insurers to submit reports of suspected fraud electronically. The system has been fully operational since the first quarter of 2007. In 2011, approximately 93 percent of the 23,422 fraud

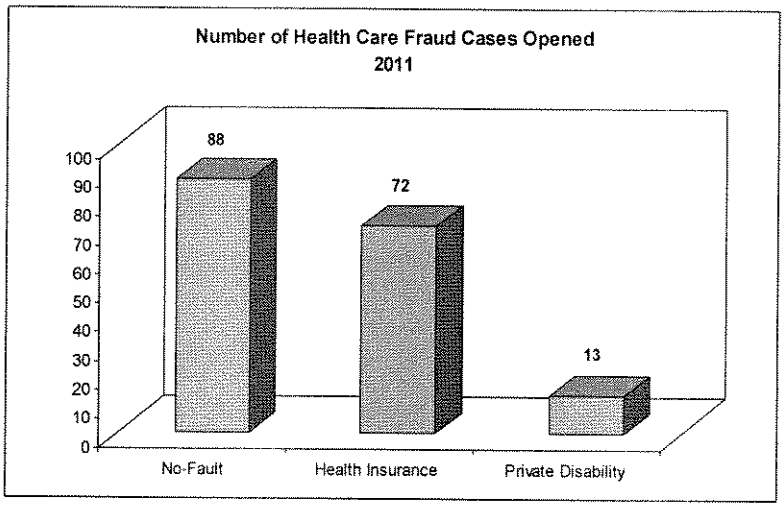
reports received by the Department were transmitted electronically and received remotely from insurers. Insurers have access to FCMS through the Department's portal using secure accounts.

The Department received 14,033 reports of suspected health care fraud during 2011 – 1,915 involving accident and health insurance, 144 involving disability insurance and 11,974 involving no-fault. A total of 173 new health care fraud cases were opened for investigation. Of these, 72 involved accident and health, 13 involved disability and 88 involved no-fault. In contrast, of a total 170 new health care fraud cases opened in the prior year, 72 involved no-fault. (It should be noted that frequently multiple fraud reports can be linked to one case.) At the same time, investigations continued in numerous cases that were opened in prior years. Health care fraud investigations by the Department resulted in 210 arrests in 2011 compared to 159 arrests in 2010 - an increase of 32%.

Graph 3



Graph 4



B. Consumer Reporting

Consumers are encouraged to report suspected fraud to the Department. The Bureau maintains a toll-free hotline to facilitate reporting. Once a report is received, an investigator will contact the caller for details maintained on a confidential basis. The Department recorded an average of 21 calls per week during 2011. The "Consumers" section on the Department's website also includes a link to a fraud report form and instructions for consumers to report fraud to the Department by mail or fax. The section is designed to help consumers recognize, report and combat insurance fraud.

IV. The Year in Review

A. Major Cases in 2011

Numerous health care fraud investigations were conducted during the past year. Some of these cases are summarized below.

- **No Treatment:** In February, a Manhattan podiatrist was charged with stealing more than $100,000 from a health insurer by submitting claims for treatment that never occurred and asking patients to lie to investigators. He is accused of using patient information of at least five persons to submit claims to CIGNA Insurance Company. In two instances, the defendant allegedly accepted payment for claims he filed on behalf of patients, one of whom was in Europe and the other at Disney World when the treatment purportedly was provided. CIGNA paid out a total of $100,671 on the fraudulent claims. An investigation by the Department led to the arrest.

- **Probation and Restitution:** In March, an upstate resident was sentenced to three years' probation and ordered to pay $33,000 in restitution. Following an auto accident, he received prescriptions for medications through his no-fault insurance coverage. He submitted the receipts to Selective Insurance Company for reimbursement with an altered bill indicating that he had paid the entire cost of the medications. An investigation uncovered evidence that Medicaid had paid for the prescriptions, with the exception of his co-payments that ranged from $.50 to $6, the only out-of-pocket expenses the defendant incurred.

- **Forged Prescriptions:** An investigation resulted in the arrest in March of a registered nurse in Nassau County for insurance fraud. The defendant had 17 prescriptions for controlled substances filled at various local pharmacies under her health insurance plan. Records from three of the pharmacies showed that the defendant had picked up the prescriptions. Numerous physicians purportedly wrote the prescriptions, however, the physicians in question informed investigators that the prescriptions were forged. As a result of the fraud, the defendant's insurance plan paid the pharmacies $10,679 for forged prescriptions.

- **Fraudulent Billing:** A Yonkers medical billing clerk was employed by a doctor who also treated her as a patient. The investigation found that, during the first half of 2008, the

clerk had submitted 20 claims totaling $52,200 for services that were not provided to her and for visits that never took place. As a result, Nippon Life Insurance Company paid out $28,326 on the fraudulent claims. The clerk was arrested in June on a charge of insurance fraud.

- **Phony Claims:** A pharmacist and his roommate were arrested in July and charged with insurance fraud as a result of an investigation. The pharmacist allegedly used the computer system at the Brooklyn drug store where he was employed to generate phony claims in the name of his roommate as if actual prescriptions had been written and filled. The roommate then submitted the phony claims to Medco Health Solutions, a pharmacy benefits management program, and obtained reimbursements of more than $1 million.

- **Unqualified Participants:** A New York-licensed broker was charged with enrolling small business owners in Healthy New York, a state-sponsored health insurance plan, which they were not qualified to participate in. The broker allegedly helped the small business owners file applications to MVP Healthcare and charged them fees ranging from $250 to $1,000. The fraudulently obtained coverage resulted in MVP's payment of an estimated $491,000 in medical and prescription drug claims and $7,800 in commissions to the broker. The broker was arrested in July as a result of the investigation.

- **Stolen Prescription Pads:** A fourth suspect was charged with health care fraud in a continuing investigation led by the Department with the assistance of the U.S. Department of Health and Human Services' Office of the Inspector General. Evidence indicated that the suspect had stolen prescription pads from medical facilities, sold some of the pads and filled prescriptions for controlled substances with the remaining pads. He then sold the medications he had obtained illegally. A search warrant executed at his Bronx residence in September led to his arrest. Three other suspects in the case had previously been arrested in connection with a scheme to steal blank prescription pads, write prescriptions for controlled substances (*i.e.*, oxycodone), and have them filled. Search warrants were executed at the residences of those suspects in August based on evidence gathered during the investigation. The suspects were arrested in August and September for allegedly running a fraudulent prescription drug ring from their homes.

- **Claims-Handling Complaint:** A New York City man was arrested in September and charged with filing nine fraudulent claims for $22,570 with Aetna Insurance Company for medical treatment he allegedly had not received. The investigation disclosed that a doctor who the man claimed had performed medical services in January 2010 had died in August 2009. Several other claims indicated treatment by another doctor at NYU Langone emergency room but investigators found that there was no such doctor associated with NYU and the State Education Department Office of the Professions had no record of a health care provider with the name provided on the suspect's claims. After filing the claims and before the investigation was initiated, the suspect wrote to the Superintendent of Insurance twice and spoke with him on one occasion to complain about Aetna's handling of his claims. Aetna paid $11,256 on the nine claims.

- **Upcoding:** After pleading guilty to federal health care fraud in May, a chiropractor was sentenced in November to five years' probation and was ordered to pay $199,999 in restitution to Excellus BlueCross BlueShield. From 2005 through 2009, he submitted more than $200,000 in fraudulent claims to Excellus. In numerous instances he provided routine services but submitted claims for more expensive treatments, a practice known as upcoding. In other instances, he billed for services that he never provided and for visits that never occurred. His arrest was the result of an investigation conducted by Department investigators and the FBI.

- **Participation for Members Only:** A senior official of the Otsego County Chamber of Commerce was arrested for his participation in a fraudulent health insurance scheme. He enrolled New York City residents in the Chamber's health plan by maintaining that they were Chamber members and offering them lower rates than they would have paid for coverage in the New York City area. He enrolled other individuals outside of Otsego County in the Chamber's legitimate health plan after creating a nonexistent "associate member" designation for them. The enrollees were unaware that they had been fraudulently listed as Chamber members. The Department began its investigation after being contacted by MVP Health Care, which had noticed an unusual spike in new enrollments with many enrollees residing outside of Otsego County. After the scheme was discovered, the 400 New York City enrollees and 120 legitimate Otsego County enrollees lost their coverage. Coverage for the Otsego County enrollees subsequently was reinstated under a new plan. MVP lost more than $135,000 in premiums, and paid more than $654,000 in claims for medical treatments, plus $285,000 for prescription drugs for the fraudulently enrolled members.

- **Operation Eye In The Sky:** Three drivers and five passengers were arrested in March for staging an accident in the Bronx in June 2010 and subsequently filing no-fault claims for nonexistent injuries. A video surveillance camera caught them circling the block and then setting up the three-car collision. After assessing the damage, the drivers returned to their cars and repeated the "accident" to cause more damage. They were treated for their alleged injuries at local Bronx medical clinics that billed insurers up to $39,000. The three men told investigators that one of them stopped short, leaving no time for the other two to avoid hitting the stopped car. Evidence gathered during an investigation by the Department and the NYPD's Fraudulent Accident Investigations Squad indicated that the eight defendants were friends prior to the accident.

- **Prescribed For Herself**: A Rochester pharmacist was accused of prescribing medications for herself by calling prescriptions in to local pharmacies using the Drug Enforcement Administration numbers of two doctors, one of whom was her former husband. The prescriptions were then submitted electronically to Excellus Health Plan which paid out $1,200 in reimbursements for the illegally prescribed drugs. The Rochester Office of the FBI requested the assistance of the Department in the investigation that led to the pharmacist's arrest in March.

- **Illegally Obtained Medications:** In March, agents from the FBI and the IRS asked the Department for assistance in an investigation that revealed that a Rochester attorney was

receiving large quantities of prescription pain killers from a local doctor, although his medical records did not support the need for those medications. Over a five-year period, Excellus Health Plan paid out $398,793 for the illegally obtained medications. Following a sealed federal grand jury indictment, a warrant was issued and the attorney was arrested in May and charged with health care fraud and related crimes.

- **Videotape Evidence:** A Bronx man who filed a no-fault application in September 2010 subsequently sought and received medical treatment for purported injuries. A review of a videotape of the accident scene, however, showed that the defendant was not involved in the accident and was not in proximity to any of the vehicles involved in the accident. As a result of the fraud, Liberty Mutual Insurance Company was billed more than $20,000 for unnecessary medical treatment. Department investigators and the NYPD's Fraudulent Accident Investigations Squad conducted the investigation that led to the man's arrest in April.

- **Federal Prison Sentence and Restitution:** After pleading guilty to one misdemeanor count of theft in connection with health care fraud in January, a Buffalo podiatrist was sentenced in May to six months in federal prison and one year of supervised release, and was ordered to pay restitution of $36,070 to Medicare and $799 to Univera Healthcare. He had been charged with 28 counts of health care fraud in January 2009 and subsequently admitted that in April 2005 he submitted a claim to Medicare falsely stating that he had performed a procedure called a "wedge excision." He was originally charged with repeatedly billing Medicare and private insurers for expensive treatments when he was actually providing only routine foot care. The investigation that led to his arrest was conducted by the Western New York Health Care Fraud Task Force, of which the FFCPD's Frauds Bureau is a member.

- **Sting Operation Nets "Runner":** As a result of an undercover sting operation conducted by the Department and the Suffolk County Insurance Crime Bureau, a known "runner" was arrested in May and charged with computer trespass. The defendant allegedly paid two employees at a hospital in Bay Shore for patient file information. He then contacted the patients and steered them to specific attorneys and medical clinics in an insurance fraud scheme. The two hospital employees were arrested in February and also charged with computer trespass.

- **Podiatrist Sentenced:** After pleading guilty to grand larceny in March, an Orleans County pediatrician was sentenced in August to five years' probation and 200 hours of community service, and was ordered to pay $260,877 in restitution ($81,544 to insurers and $179,333 to Medicaid). He had received free vaccines that were supposed to be dispensed to Medicaid patients; however, he used the vaccines for non-Medicaid patients and billed their private insurers. The investigation was conducted by the Western New York Health Care Fraud Task Force, of which the FFCPD's Insurance Frauds Bureau is a member.

- **No-Fault Fraud:** Twelve suspects were indicted for participating in a no-fault scheme. The indictment charged that they staged auto accidents to generate fraudulent billing for

unnecessary medical treatments and coached legitimate accident victims to exaggerate injuries. The suspects were accused of defrauding numerous insurers of more than $45,000. The Department, the NYPD's Fraudulent Accident Investigations Squad, the Queens DA's Office and the SIUs of Progressive, GEICO and Safeco Insurance Companies collaborated on the investigation that led to the arrests.

- **No-Fault Fraud Mill:** Twenty-four defendants were charged with health care fraud for their participation in billing scams that defrauded insurers, Medicare and Medicaid out of millions of dollars. Twenty-two of the defendants were accused of causing no-fault insurers to pay out millions in reimbursements for medical treatment that was never provided or that was medically unnecessary. Two indictments charged doctors who allegedly faked ownership of medical clinics and concealed the fact that the true owners were not medical professionals. These "front" doctors, other health care providers and clinic employees caused fraudulent bills to be submitted to insurers. Charges were also brought against "runners" who were paid to recruit patients and patients who faked and exaggerated injuries from auto accidents. The patients allegedly were coached by clinic employees on how to describe their purported injuries to insurance companies. Another indictment named two operators of a medical supply company for allegedly forging doctors' signatures and prescriptions to support fraudulent billing to Medicare and Medicaid for durable medical equipment. The defendants each face a maximum sentence of 20 years in prison. Six search warrants were executed and ten accounts were frozen in connection with the investigation, which was conducted jointly by the Department, the Office of the U.S. Attorney for the Southern District, the FBI, the NYPD and U.S. Department of Health and Human Services.

- **Two Sentenced for Health Care Fraud:** An investigation by the Department investigators together with the FBI culminated in jail sentences and orders to pay restitution for two defendants for their parts in a scheme to defraud numerous medical insurance providers by submitting fraudulent claims. One woman was sentenced to six months and ordered to pay $247,391 after having been arrested in 2003 and subsequently pleading guilty to one count of health care fraud. Her co-defendant in the scheme, who billed massages as physical therapy and billed for services not provided, was sentenced to 30 months and ordered to pay $2.6 million. She had been arrested in 2003 and subsequently pled guilty to health care fraud and obstruction of justice.

- **60th Defendant Arrested:** An ongoing investigation into no-fault fraud led to the arrest of a Brooklyn man charged with larceny. He intentionally had crashed his vehicle into a bicycle to defraud Progressive Insurance Company. The defendant falsely reported the "accident" to Progressive, was treated for nonexistent injuries, and Progressive paid out more than $2,000 for unnecessary medical treatment. The man is the 60th defendant to be arrested in connection with this long-term investigation conducted by the Department and the NYPD's Fraudulent Accident Investigations Squad.

- **Services Not Rendered:** A joint investigation conducted by the Department and the New York State Office of Medicaid Fraud led to the November arrest of a Rochester optometrist for allegedly billing for services that he did not provide. The optometrist

fraudulently obtained $36,752 from Excellus Health Plan and $3,946 from Medicaid. Investigators learned that he was a salaried employee at an eye-care center who was not authorized to submit bills to insurers. When interviewed, the defendant confessed to submitting the fraudulent claims.

- **Fraudulent Claims:** A Long Island business owner purchased a health plan from Oxford Insurance Company for himself and his sister, who was listed on documents submitted to Oxford as an employee of her brother's company. Oxford paid $130,000 in medical bills for the sister; however, the sister admitted that she was not an employee when she was interviewed by the investigations from the Department and the Suffolk County DA's Office. The business owner was arrested and charged with insurance fraud.

B. Continuing Education/Training

The Department's investigative staff members routinely attend career development seminars and training programs to increase their proficiency in investigative procedures, use of Department/industry/law enforcement databases as investigative tools, and problem-solving techniques in order to stay current with emerging developments in the area of health insurance fraud.

During 2011, Bureau staff took advantage of many of the educational opportunities offered by the New York Anti-Car Theft and Fraud Association, the New York Prosecutors Training Institute and the New York State Division of Criminal Justice Services, among others.

C. Outreach Program

The Training Officer of the FFCPD's Frauds Buireau and other members of the investigative staff provided training for local police and fire units, prosecutors, insurers and community groups throughout the year. The Bureau provided training to 31 groups that included 2,388 participants during 2011, as detailed in the following table:

Insurance Frauds Bureau
2011 Outreach Program
Insurers, Law Enforcement and Community Groups

Date	Group	Location	Number of Attendees
01/20/11	Office for the Aging (Caseworkers)	Hauppauge, NY	23
01/28/11	NYS Office of Fire Prevention & Control	Montour Falls, NY	12
02/24/11	Albany Police Department (Auto Unit)	Albany, NY	30
03/03/11	Preferred Mutual Insurance Company	New Berlin, NY	16
03/09/11	Nassau Cty. Dept. of Sr. Citizen Affairs	Merrick, NY	35
03/14/11	NYS Office of Fire Prevention & Control	Montour Falls, NY	25
03/22/11	Delaware Cty. Dept. of Emergency Svcs. (Fire Investigation Unit)	Delhi, NY	15
04/08/11	Co-op City Senior Center	Bronx, NY	50
04/26/11	NAIC International Fellows Program (Fellow)	New York, NY	1
04/28/11	NYS Special Investigations Unit	Saratoga, NY	100
05/06/11	Westchester County Police Academy (Recruits)	Valhalla, NY	68
05/05/11	NYS Assn. of Self-Insured Counties	Saratoga, NY	50
05/05/11	NY Prosecutor's Training Institute	Brooklyn, NY	100
05/06/11	Westchester County Police Academy (Recruits)	Valhalla, NY	15
05/11/11	Broome County Bank Security Officers	Binghamton, NY	9
06/04/11	Port Washington Senior Center	Port Washington, NY	26
06/06/11	New York State Insurance Department	New York, NY	28
06/13/11	NYS Office of Fire Prevention & Control	Montour Falls, NY	20
06/22/11	Liberty Mutual Insurance Company	Syracuse, NY	38
06/24/11	Delegation from Thailand	New York, NY	4
07/14/11	Port Washington Senior Center	Port Washington, NY	9
07/21/11	CCNS Bayside Senior Center	Bayside, NY	70
07/26/11	McNeil and Company	Cortland, NY	15
08/17/11	Hereford Insurance Company	Long Island City, NY	101
08/25/11	Young Israel of Midwood Senior Center	Brooklyn, NY	30
09/14/11	NYSID Examiner Trainees	New York, NY	27
12/08/11	Westchester County Police Academy (Recruits)	Valhalla, NY	31
12/13/11	NYPD Police Academy (Recruits)	New York, NY	640
12/15/11	NYPD Police Academy (Recruits)	New York, NY	240
12/19/11	NYPD Police Academy (Recruits)	New York, NY	200
12/21/11	NYPD Police Academy (Recruits)	New York, NY	360
TOTALS	GROUPS 31	PARTICIPANTS	2,388

D. Insurance Frauds Bureau Offices

NEW YORK OFFICE
25 Beaver Street
Suite 542
New York, NY 10004
(212) 480-6074
Fax # (212) 480-6066

MINEOLA OFFICE
163 Mineola Blvd.
Mineola, NY 11501
(516) 248-5770
Fax # (516) 248-5727

ALBANY OFFICE
One Commerce Plaza
Albany, NY 12257
(518) 473-0833
Fax # (518) 473-0369

BUFFALO OFFICE
Walter J. Mahoney State Office Bldg.
65 Court Street - Room 7
Buffalo, NY 14202
(716) 847-7622
Fax # (716) 847-7925

ROCHESTER OFFICE
189 North Water Street
Rochester, NY 14604
(585) 325-1681
Fax # (585) 325-6746

SYRACUSE OFFICE
620 Erie Blvd., West
Suite 105
Syracuse, NY 13204
(315) 423-1248
Fax # (315) 423-3742

ONEONTA OFFICE
Homer Folks Facility
28 Hill Street, Room 210
Oneonta, NY 13820
(607) 433-3628
Fax # (607) 433-3623

EXHIBIT 3

NEW YORK STATE
DEPARTMENT OF FINANCIAL SERVICES

PROPOSED
FOURTH AMENDMENT TO 11 NYCRR 65-3
(INSURANCE REGULATION No. 68-C)

CLAIMS FOR PERSONAL INJURY PROTECTION BENEFITS

I, Benjamin M. Lawsky, Superintendent of Financial Services of the State of New York, pursuant to the authority granted by Sections 202 and 302 of the Financial Services Law, Sections 301, 2601, 5221 and Article 51 of the Insurance Law, and Section 2407 of the Vehicle and Traffic Law, do hereby promulgate the following Fourth Amendment to Subpart 65-3 of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Insurance Regulation No. 68-C), to take effect upon publication in the State Register, to read as follows:

(NEW MATTER IS UNDERSCORED; MATTER IN BRACKETS IS DELETED)

New subdivisions (o) and (p) are added to section 65-3.5 to read as follows:

(o) An applicant from whom verification is requested shall, within 120 calendar days from the date of the initial request for verification, submit all such verification under the applicant's control or possession or written proof providing reasonable justification for the failure to comply. The insurer shall advise the applicant in the verification request that the insurer may deny the claim if the applicant does not provide within 120 calendar days from the date of the initial request either all such verification under the applicant's control or possession or written proof providing reasonable justification for the failure to comply. This subdivision shall not apply to a prescribed form (NF-Form) as set forth in Appendix 13 of this Title, medical examination request, or examination under oath request.

(p) With respect to a verification request and notice, an insurer's non-substantive technical or immaterial defect or omission, as well as an insurer's failure to comply with a prescribed time frame, shall not negate an applicant's obligation to comply with the request or notice.

Paragraph (3) of section 65-3.8(b) is amended to read as follows:

(3) Except as provided in subdivision (e) of this section, an insurer shall not issue a denial of claim form (NYS Form N-F 10) prior to its receipt of verification of all of the relevant information requested pursuant to [section] sections 65-3.5 and 65-3.6 of this Subpart (e.g., medical reports, wage verification, etc.). However, an insurer may issue a denial if, more than 120 calendar days after the initial request for verification, the applicant has not submitted all such verification under the applicant's control or possession or written proof providing reasonable justification for the failure to comply, provided that the verification request so advised the applicant as required in section 65-3.5(o) of this Subpart. This subdivision shall not apply to a prescribed form (NF-Form) as set forth in Appendix 13 of this Title, medical examination request, or examination under oath request.

Subdivisions (g) through (j) of section 65-3.8 are relettered subdivisions (i) through (l) and new subdivisions (g) and (h) are added to read as follows:

(g) Proof of the fact and amount of loss sustained pursuant to Insurance Law section 5106(a) shall not be deemed supplied by an applicant to an insurer and no payment shall be due for such claimed services under any circumstances:

(1) when the claimed services were not provided to an injured party; or

(2) for those claimed service fees that exceed the charges permissible under the schedules prepared and established pursuant to Insurance Law sections 5108(a) and (b) for services rendered by New York medical providers.

(h) With respect to a denial of claim (NYS Form N-F 10), an insurer's non-substantive technical or immaterial defect or omission shall not affect the validity of a denial of claim.

EXHIBIT 4

News Room
Banking Division Press Archive
Insurance Division Press Archive

Press Release

May 01, 2012

Contact: David Neustadt 212-709-1691

CUOMO ADMINISTRATION EXPANDS EFFORT TO END NO-FAULT FRAUD; AIMED AT STOPPING RAPID RISE IN AUTO INSURANCE RATES

Following push to close medical mills, new regulation will stop payments where no medical treatment is rendered and cut red tape to speed resolutions

Benjamin M. Lawsky, Superintendent of Financial Services, today continued the Cuomo Administration's aggressive program to end no-fault auto insurance fraud with regulatory reforms that close loopholes that allow lawbreakers to exploit the system. This follows an investigation announced last month into health care providers whose participation in medical mills is essential to making fraudulent no-fault claims possible.

The new regulation tackles two issues—doctors being paid for health care they do not actually provide and some technical issues that are often used to prevent a decision on a claim or keep an otherwise faulty claim open, both of which increase costs to consumers.

The new regulation:

· Puts an end to requirements that mandate insurers pay for treatments that were never actually provided, or pay more than the established fee schedule for a given service.

· Prevents healthcare providers from ignoring requests for evidence that the treatments they are providing are medically necessary by setting a 120 day deadline to provide requested information.

· Closes the loophole that allows courts and arbitrators to force insurers to pay fraudulent claims simply because the insurer made minor paperwork errors when processing a claim.

"These reforms will ensure that New Yorkers get the proper and timely treatment for legitimate injuries that they deserve, while closing loopholes that allow criminal medical mills to scam the system and drive up insurance premiums. We can and must have a system that works effectively for those in need and protects all drivers from paying a 'Fraud Tax' imposed by criminals," Superintendent Lawsky said. "The new regulations will give insurers more time to prove fraud and prevent payment, unlike the current system that requires insurers to pay no-fault claims within 30 even when they suspect that health care services have not actually been provided."

"I applaud Governor Cuomo and Superintendent Lawsky for continuing the fight to reform New York's broken no-fault auto insurance system," said Kristina Baldwin, co-spokesperson for Fraud Costs NY and assistant vice president for Property Casualty Insurers Association of America. "If implemented, these regulatory changes will help close the glaring loopholes that allow criminals to rip off the system and control the ensuing costs which are passed on to drivers by way of higher premiums."

Ellen Melchionni, co-spokesperson for Fraud Costs NY and president of the New York Insurance Association said, "Governor Cuomo and Superintendent Lawsky demonstrated real leadership when they took the critical first step reforming New York's no-fault system by targeting unscrupulous medical providers. Now, they are continuing the fight with important and crucial reforms that will protect consumers to ensure that those truly injured in an accident receive the necessary treatment they deserve."

Gary Henning, Regional Vice President, Northeast Region American Insurance Association, said, "The American Insurance Association applauds Governor Cuomo and Superintendent Lawsky for their continuing efforts against no-fault fraud with the promulgation of these regulations. These common-sense reforms will help take costs out of the no-fault system to the benefit of New York's drivers."

Regulation 68 implements New York's no-fault automobile insurance law by establishing no-fault claims settlement procedures. The new regulatory reforms amend Regulation 68 in three ways:

1. Prevent billing for services not rendered or billing for more than the mandated fee schedule.

The current law provides no remedy to insurers when doctors and other health care providers bill in excess of the mandated workers' compensation fee schedule or for services not actually rendered—two major issues plaguing the no-fault system.

No-fault law requires insurers to pay claims in 30 days, but often it takes longer to discover that the health care was not actually provided. Under current law, courts do not allow insurers to deny claims after the deadline based on the fact that the provider has over-billed or billed for phantom services.

This amendment provides that no payment is due where the treatments were not actually provided or to the extent that the fees charged exceeded the fee schedule. So insurers will be able to use those as grounds for denying a claim.

Consumers would greatly benefit from curbing these dishonest practices because no-fault benefits are typically subject to a $50,000 limit. Thus, when providers over-bill or bill for phantom services, the consumer's no-fault monetary limit is unjustly depleted.

2. Set a time limit for responding to verification requests and denial for untimely response.

Within 30 days of receiving a no-fault claim from a healthcare provider, the insurer must pay or deny the claim, or, within 15 days, send a request for additional information to verify the claim. Once it receives verification, the insurer has 30 more days to pay or deny the claim.

There is currently no deadline for responding to a verification request. In addition, an insurer is not allowed to deny or close a claim if it never receives the requested verification. Accordingly, some claims remain open indefinitely. Under the law, insurers must pay a very high interest rate on delayed payments, so anything that causes delays can substantially increase costs.

To solve this problem, this amendment requires the healthcare provider to provide a response within 120 days of an insurer's verification request, or provide reasonable justification why it cannot do so. If the applicant fails to do one or the other, the amendment permits an insurer to deny the claim. The amendment should thus speed claims resolution and reduce the number of claims that remain open indefinitely.

3. Prevent immaterial defects in notices from invalidating them.

Under current law, if there is a small and insignificant error in an insurer's verification request or a claim denial, the healthcare provider can seek to fight it through the courts or arbitration. The new amendment states that a technical error cannot be used to avoid responding to a verification request and does not invalidate an otherwise proper claim denial. The amendment should substantially reduce litigation and arbitration over these issues, reducing yet another obstacle to the timely resolution of no-fault claims.

This proposed draft regulation will now go through the normal rule-making process, known as the State Administrative Procedure Act ("SAPA") process. The regulation will be printed in the State Register on May 16, which will trigger the start of a 45-day period for public comment. A copy of the draft regulation can be found at **http://www.dfs.ny.gov/insurance/rproindx.htm**. Comments can be submitted to: **Hoda Nairooz**.

EXHIBIT 5

STATE OF NEW YORK
INSURANCE DEPARTMENT
25 BEAVER STREET
NEW YORK, NEW YORK 10004

November 29, 2000

Francis J. Serbaroli, Esq.
Cadwalader, Wickersham & Taft
100 Maiden Lane
New York, NY 10038

Dear Mr. Serbaroli:

This is in response to your request for an opinion from the Office of General Counsel as to whether the application of N.Y. Ins. Law §5106 (McKinney 2000), which provides that the failure of an insurer to make payment of No-Fault benefits within thirty days after proof of claim has been submitted by a claimant renders payment of the claim overdue, prohibits a subsequent civil action by an insurer for the recovery of claims previously paid in accordance with N.Y. Ins. Law §5106 (McKinney 2000), where the claimant had used fraudulent means to submit claims for No-Fault benefits and received payment for those claims.

The purpose of N.Y. Ins. Law §5106 (McKinney 2000)and its implementing regulation is simply to provide for the prompt payment of covered No-Fault expenses due a claimant. See generally Governor's Approval Memorandum, (Feb. 13, 1973) (in Governor's Bill Jacket L. 1973, Ch. 13). The No-Fault statute thus leaves intact all common law causes of action, such as for fraud and unjust enrichment, by covered or non-covered persons against non-covered persons. See Liberty Mutual Ins. Co. v. United States, 490 F. Supp. 328 (E.D.N.Y. 1980). The Court of Appeals in Montgomery v. Daniels, 38 N.Y.2d 41 (1975), detailed the history and rationale behind the No-Fault statute, and found that one of the "predicates" for the Legislature's enactment of the law was the "long delays in claim payment." Commensurate with this intent, Section 5106 provides the statutory framework for the prompt processing of claims under the No-Fault reparations system. However, the fact of payment of a claim in no way serves to legitimize such claim in a final manner where there is "no reason to deny the No-Fault claim at the time payment is due [pursuant to Section 5106(a)]". Dermatossian v. New York City Transit Authority, 67 N.Y.2d 219, Court of Appeals (1986).

The New York No-Fault reparations law, more specifically through the payment of benefits provisions of N.Y. Ins. Law §5106 (McKinney 2000), is in no way intended and should not serve as a bar to subsequent actions by an insurer for the recovery of fraudulently obtained benefits from a claimant, where such action is authorized under the auspices of any other statute or under common law. There is nothing in the legislative history or case law interpretations of the statute or in Insurance Department regulations, opinions or interpretations of the statute that supports the argument that the statute bars such actions.

The payment of fraudulently obtained No-Fault benefits, without available recourse, serves to undermine and damage the integrity of the No-Fault system, which was created as a social reparations system for the benefit of consumers. See Governor's Approval Memorandum (Feb. 13, 1973) (in Governor's Bill Jacket L. 1973, Ch. 13) (stating that the enactment of the No-Fault law created "a new insurance reparations system which...provides substantial premium savings to [the public]"). To conclude that the No-Fault statute bars the availability of other legal remedies, where the payment of benefits were secured through fraudulent means, renders the public as the ultimate victim of such fraud, in the form of higher premiums based upon the resultant increased costs arising from the fraudulent actions. The Legislative enactment of Article 4 of the Insurance Law, more particularly through Section 409 of that article, was intended to prevent insurance fraud, and clearly evinces the important public policy interest in the prevention of insurance fraud for the protection of consumers in New York. See Governor's Approval Memorandum, New York State Legislative Annual - 1996, p. 460 (stating that the statute would provide relief to consumers by "attacking fraud whenever it occurs, and by whomever it is perpetrated."); Fafinski v. Reliance Ins. Co., 65 N.Y. 2d 990, 992 Court of Appeals (1985) stating that the legislative purposes in enacting the No-Fault law were to deny coverage for losses resulting from violations of law and to keep premiums low).

I trust this is responsive to the question you raised.

Very truly yours,

Lawrence M. Fuchsberg
Supervising Attorney

EXHIBIT 6

Civil Court of the City of New York
County of Kings
Part 65

Index Numbers: CV-068221/09, CV-048277/09

CAMBRIDGE MEDICAL PC,
A AO VERONICA PADUANO

Plaintiff,

-against-

ALLSTATE INSURANCE COMPANY

Defendant

AMENDED DECISION/ORDER FOR NON-JURY TRIAL

Present:
HON. CAROLYN E. WADE

This Court's Decision/Order, dated May 16, 2011, which in the last paragraph, awarded Plaintiff, Judgments, for the above-referenced index numbers, is hereby rescinded and replaced by the following:

The above two (2) actions were consolidated by stipulation under index number: CV-068221/09 at the commencement of the trial held on March 1, 2011. The court granted leave for both sides to submit additional documents. A copy of the sub-lease and the service agreement was admitted into evidence. It was agreed that the court's ruling with respect to the instant suit for $1,196.08, comprised of two bills, would apply to both actions.

The sole issue to be determined is whether the referral to CAMBRIDGE MEDICAL, PC ("Plaintiff") for Diagnostic Tests violates Public Health Law §238-a.

Public Health Law §238-a(1) reads, in pertinent part, as follows:

> A practitioner authorized to order [...] x-ray or imaging services may not make a referral for such services to a health care provider [...] where such practitioner [...] has a financial relationship with such health care provider.

Under §§ 238(3) and 13(g), "Financial relationship" is defined as an ownership interest, investment interest or compensation arrangement; and "X-ray or imaging services" shall mean diagnostic imaging techniques, which shall include but not be limited to Ultrasonography. Ultrasound is the subject of the referral herein.

This statute does not cover the following (§238-a(5)(b)(1)):

> payments made for the rental or lease of office space, if (A) there is a written agreement, signed by the parties, for the rental or lease of the space, which agreement specifies the spaced covered by the agreement [...] provides for a term of rental or lease of at least one year, provides for a payment on a periodic basis of an amount that is consistent with fair market value, provides for an amount of aggregate payments that does not vary, directly or indirectly, based on the volume of value of any referrals of business between the parties, and would be considered to be commercially reasonable even if no were referrals were made between the parties.

A review of the EBT transcript of Dr. Eileen S. Dehhi, dated 9/10/09, reveals that she is the President and CEO of Cambridge Medical, P.C., and that all of the ultrasound and EMG tests are administered at the satellite offices located throughout the seven counties. There are at least forty to forty-five medical providers. All of the diagnostic tests that Cambridge provided, are administered in the office of the referring providers. For each satellite office, Cambridge has a lease agreement ranging in the amount of $200-$600. In addition, Dr. Dehhi testified that there is a service agreement for extra charges for the use of the copy machine, fax machine, secretarial staff, scheduling, rescheduling, canceling patients, janitorial services, etc. This is a fix amount every month.

After extensive review of all the exhibits submitted; specifically, the service agreement, it is the court's opinion that the above activity violates Public Health Law § 238-a(1).

Accordingly, based upon the above, index numbers: 068221/09 and 048227/09, are dismissed.

This shall be the Decision and Order of the court.

5/30/11

Date

HON. CAROLYN E. WADE
Judge, Civil Court

Civil Court of the City of New York
County of Kings
Part 65

Index Numbers: CV-068221/09, CV-048277/09

CAMBRIDGE MEDICAL PC,
AAO VERONICA PADUANO

Plaintiff,

-against-

ALLSTATE INSURANCE COMPANY

Defendant

DECISION/ORDER FOR NON-JURY TRIAL

Present:
HON. CAROLYN E. WADE

The above two (2) actions were consolidated by stipulation under index number: CV-068221/09 at the commencement of the trial held on March 1, 2011. The court granted leave for both sides to submit additional documents. A copy of the sub-lease and the service agreement was admitted into evidence. It was agreed that the court's ruling with respect to the instant suit for $1,196.08, comprised of two bills, would apply to both actions.

The sole issue to be determined is whether the referral to CAMBRIDGE MEDICAL, PC ("Plaintiff") for Diagnostic Tests violates Public Health Law §238-a.

Public Health Law §238-a(1) reads, in pertinent part, as follows:

> A practitioner authorized to order [...] x-ray or imaging services may not make a referral for such services to a health care provider [...] where such practitioner [...] has a financial relationship with such health care provider.

Under §§ 238(3) and 13(g), "Financial relationship" is defined as an ownership interest, investment interest or compensation arrangement; and "X-ray or imaging services" shall mean diagnostic imaging techniques, which shall include but not be limited to Ultrasonography. Ultrasound is the subject of the referral herein.

This statute does not cover the following (§238-a(5)(b)(I)):

> payments made for the rental or lease of office space, if (A) there is a written agreement, signed by the parties, for the rental or lease of the space, which agreement specifies the spaced covered by the agreement [...] provides for a term of rental or lease of at least one year, provides for a payment on a periodic basis of an amount that is consistent with fair market value, provides for an amount of aggregate payments that does not vary, directly or indirectly, based on the volume of value of any referrals of business between the

parties, and would be considered to be commercially reasonable even if no were referrals were made between the parties.

A review of the EBT transcript of Dr. Eileen S. Dehhi, dated 9/10/09, reveals that she is the President and CEO of Cambridge Medical, P.C., and that all of the ultrasound and EMG tests are administered at the satellite offices located throughout the seven counties. There are at least forty to forty-five medical providers. All of the diagnostic tests that Cambridge provided, are administered in the office of the referring providers. For each satellite office, Cambridge has a lease agreement ranging in the amount of $200-$600. In addition, Dr. Dehhi testified that there is a service agreement for extra charges for the use of the copy machine, fax machine, secretarial staff, scheduling, rescheduling, canceling patients, janitorial services, etc. This is a fix amount every month.

After extensive review of all the exhibits submitted; specifically, the service agreement, it is the court's opinion that the above activity violates Public Health Law § 238-a(1).

Accordingly, with regard to index number: 068221/09, Plaintiff is awarded a Judgment in the amount of $1,196.08 plus statutory interest, cost and attorney's fees. Under index number: 048227/09, Plaintiff is awarded a Judgment in the amount of $598.04 plus statutory interest, cost and attorney's fees.

This shall be the Decision and Order of the court.

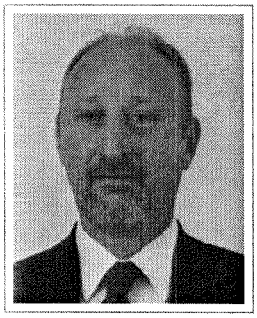
5/16/11

Date

HON. CAROLYN E. WADE
Judge, Civil Court

EXHIBIT 7

Steven J. Neuwirth, Esq.



Steven J. Neuwirth
Partner

Admitted to practice law: United States District Courts for the Eastern District of New York, Southern District of New York and the District of New Jersey and State Courts of New York and New Jersey.
Practice Areas: No-Fault/Insurance Litigation, Property Damage and Subrogation Matters, Employment, Criminal Defense
Contacting Steven Neuwirth:
Phone: (516) 741-4799
E-Mail: sneuwirth@bakersanders.com

Steven J. Neuwirth is a partner at the law firm of Baker, Sanders, Barshay, Grossman, Fass, Muhlstock & Neuwirth, L.L.C. Mr. Neuwirth brings extensive knowledge and experience in the areas of no-fault insurance, labor and employment law. He has vast experience in labor relations, collective bargaining, employment and public accommodation discrimination as well as wage & hour and unemployment law. Importantly, Mr. Neuwirth offers years of experience in insurance law having practiced at defense firms prior to joining the law firm. He currently supervises and handles day-to-day legal operations, appears regularly in all courts and handles all facets of litigation.

A graduate of SUNY at Stony Brook and New York Law School, Mr. Neuwirth is admitted to practice in the United States District Courts for the Eastern District of New York, Southern District of New York and the District of New Jersey, as well as the State Courts of New York and New Jersey. He appears regularly in the federal and state courts as well as at various administrative and arbitration proceedings.

Prior to joining the firm, Mr. Neuwirth spent years practicing in the areas of employment and criminal defense. He also was a senior associate at an insurance defense law firm where he litigated no-fault, property damage and subrogation matters.

Mr. Neuwirth regularly lectures attorneys and judges on the practice of law in No-Fault litigation in the New York State and local bar associations. He also regularly appears before medical groups on No-Fault and other matters of concern to medical providers. Mr. Neuwirth is also an active member of the Queens County Bar Association, where he serves on the Civil Court Committee, and regularly meets with judges and court staff to effectuate the interests of his clients. He also served as a Small Claims Arbitrator in New York City Civil Court, Queens County and in Suffolk County District Court. Additionally, he has volunteered as a moot court judge for the annual National Wagner Moot Court Competition. Lastly, he has served in various positions on the Board of Directors of the Kings Park Jewish Center including its Executive Vice President and Chairman.

About The Firm

National Collections and Personal Injury Law Firm

In early 2004, Sanders, Grossman, Fass & Muhlstock, P.C. and the law offices of Baker Barshay & Neuwirth, LLP, merged to form one of the largest Medical Collection firms in the State of New York. Since then Baker, Sanders, Barshay, Grossman, Fass, Muhlstock & Neuwirth, L.L.C., has represented over 7,000 medical providers in New York and New Jersey. In addition, the firm has achieved significant results for personal injury clients through its extensive experience and exceptional trial work.

Reaching the peak within the Medical Collections arena as well as Personal Injury, the firm later diversified its practices and expertise to consumer debt collections. Developing an innovative strategy over the years, today, the firm serves at a national scope representing one of the largest issuers of credit in the world.

The firm's ability to sustain such a massive clientele base and facilitate successful recoveries for their clients is attributed to

On The Front Line

Industrial Canal Breach Litigation

On August 29, 2005, one of the deadliest and costliest natural disasters in United States history hit the southern shores of Louisiana. Hurricane Katrina caused great damage to much of the north-central Gulf Coast, especially New Orleans.

Prior to the storm, six barges were moored by Lafarge North America, in front of its facility by the Industrial Canal. Two of them were owned by Ingram and at the time, being operated by Lafarge. Lafarge had finished offloading one of the barges less than 48 hours before Katrina's arrival.

Baker Sanders represents the Lower 9th Ward and 22,500 homeowners in claims against LaFarge. To learn more about The Barge case, click here.

the company's size, state-of-the-art infrastructure and most importantly zealously talented attorneys.

Take a few minutes to explore our web site and learn about the role our firm plays in the growing area of personal injury, medical and consumer collections. Feel free to click the "contact us" button to request more information or call us at our Garden City office at 516-741-4799.

Resources

No Fault Paradise Blog
nofaultparadise.org

Learn more about Personal Injury, Consumer Collection and Medical Collection.

Seminar Event Calendar
There are currently no seminars or events scheduled.
Please check back soon.

Contact Us
100 Garden City Plaza - Suite 500
Garden City, New York 11530
(516) 741-4799

EXHIBIT 8

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS

Index No: 068221/09

CAMBRIDGE MEDICAL, P.C.
A/A/O Luan Tran

Plaintiff,

-against-

ALLSTATE INSURANCE COMPANY

Defendant.

PLAINTIFF'S TRIAL MEMO

1. Dr. Debbi, the owner of Cambridge Medical, PC ("Cambridge") did testify at her September 10, 2009 deposition that all of Cambridge's ultrasound tests are administered at the offices of the 40 to 45 medical providers who have requested that Cambridge perform these tests on their patients. Dr. Debbi also testified that Cambridge pays a rental fee for the office space use. Defendant, in their trial memo, mischaracterizes these payments as referral fees.

2. The instant case does not fall within the ambit § 238-a of the Public Health Law. The language of the statute plainly reads as follows: Prohibition of financial arrangements and referrals 1. (a) A practitioner authorized to order ***clinical laboratory services, pharmacy services, radiation therapy services or x-ray or imaging services*** may not make a referral for such services to a health care provider authorized to provide such services where such practitioner or immediate family member of such practitioner has a *financial relationship* with such health care provider. (b) A health care provider or a referring practitioner may not present or cause to be presented to any individual or third party payor or other entity a claim, bill, or other demand for payment for ***clinical laboratory services, pharmacy***

services, radiation therapy services or x-ray or imaging services furnished pursuant to a referral prohibited by this subdivision * * * (emphasis added).

3. It should be noted that the various provisions of § 238-a of the Public Health Law have different effective dates and said section contains a number of exceptions and definitions.

4. Even assuming the services in question fall within the ambit of 238(a), which they do not, Cambridge would be exempt in accordance with Section 3 (i) of § 238-a of NYS Public Health Law which contains the following exception, that a compensation arrangement shall not include:

> payments made for the rental or lease of office space, if (A) there is a written agreement, signed by the parties, for the rental or lease of the space, which agreement specifies the space covered by the agreement and dedicated for the use of the lessee, provides for a term of rental or lease of at least one year, provides for a payment on a periodic basis of an amount that is consistent with fair market value, provides for an amount of aggregate payments that does not vary, directly or indirectly, based on the volume or value of any referrals of business between the parties, and would be considered to be commercially reasonable even if no referrals were made between the parties; or (B) in the case of rental or lease of office space in which a practitioner who is an interested investor, or an interested investor who is an immediate family member of the practitioner, has an ownership or investment interest, the office space is in the same building as the building in which the practitioner or group practice of which the practitioner is a member has a practice

5. The rental fee for the office space was paid pursuant to a written and signed agreement for the rental of specified space for Cambridge's use. The lengths of the leases are also consistent with the statute and the amounts paid are consistent with fair market value. Defendant acknowledges that there are exemptions to §238-a, but they provide no justification why any would not be applicable here.

6. Defendant offers no evidence or proof of any kind, including what would presumably be necessary expert testimony on the issue of per square footage valuation to support their defense.

7. In addition to §238-a, various New York State statutes including N.Y. Education Law §6509-a prohibit fee-splitting by health professionals.

8. The purpose of these sections proscribing fee-splitting by health professionals was to regulate medical facilities supported by New York State Medicaid assistance funds; they were not primarily meant to benefit consumers of medical services generally or private health maintenance organizations. Deutsch v. Health Ins. Plan of Greater New York, 1983, 573 F.Supp. 1443.

9. While it is the established public policy of this State that medical providers may not engage in voluntary prospective fee-splitting arrangements (see, Education Law § 6509-a; 8 NYCRR 29.1 [b]; United Calendar Mfg. Corp. v Huang, 94 AD2d 176), this blanket proscription against fee-splitting does not extend to a licensed professional associated with or employed by a professional corporation formed to provide medical services (see, Education Law § 6509-a; 8 NYCRR 29.1 [b]; Albany Med. Coll. v McShane, 66 NY2d 982; Dolin v Long Is. Jewish Med. Ctr., 139 AD2d 487; cf., Hauptman v Grand Manor Health Related Facility, 121 AD2d 151).

10. Other instances where the court held that a contractual fee arrangement did not constitute an illegal kickback or improper fee splitting include: a psychiatrist who paid 20% of his fees to medical corporation for admission to a nursing home Hauptman v. Grand Manor Health Related Facility, Inc. (1 Dept. 1986) 121 A.D.2d 151, 502 N.Y.S.2d 1012 and a cardiologist who tried to recover difference between the hospital's billing rate for his services and the contract rate under a theory of quasi contract Zador v. Millard Fillmore Hosp. (4 Dept. 1999) 261 A.D.2d 876, 689 N.Y.S.2d 816

11. Here Defendant cites cases that are factually different and simply states that the amounts paid for rent were an improper referral that violates § 238-a of the Public Health Law. Defendant has not presented any facts that would support this conclusion. As a matter of law, this Court must determine that there is no violation of Public Health Law 238-a and thus payment for services rendered by the Plaintiff is proper.

Dated: Garden City, New York
March 31, 2011

Baker, Sanders, Barshay, Grossman,
Fass,Muhlstock & Neuwirth, L.L.C.
100 Garden City Plaza - Suite 500
Garden City, New York 11530
(516) 741-4799

Co-Counsel for the Plaintiff
Matthew J. Conroy & Associates, PC
350 Old Country Road, Suite 106
Garden City, NY 11530
(516) 248-2425

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS

Index No: 068221/09

CAMBRIDGE MEDICAL, P.C., A/A/O Luan Tran

Plaintiff,

AFFIDAVIT OF SERVICE

- against -

ALLSTATE INSURANCE COMPANY

Defendant.

STATE OF NEW YORK)
COUNTY OF SUFFOLK) ss.

I, FARUKH ABDULLAYEV , being duly sworn say:

I am over 18 years old and am not a party to this action. On MAR 3 1 2011 , I served upon the defendant herein a copy of the annexed plaintiff's trial memo by depositing same in a post-paid envelope in care of the United States Post Office, and affixed thereupon was the defendant's address:

SHORT & BILLY, P.C.
217 BROADWAY, SUITE 300
NEW YORK, NEW YORK 10007

MAR 3 1 2011

Sworn to before me

Notary Public

BS-3082-910562

ROSEMARIE M. MADRID
Notary Public, State of New York
No. 01MA6232858
Qualified in Queens County
Commission Expires December 13, 2014

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS

CAMBRIDGE MEDICAL, P.C.
A/A/O Veronica Paduano

Plaintiff,

-against-

ALLSTATE INSURANCE COMPANY,

Defendant.

Index No. 48277/09

PLAINTIFF'S
TRIAL MEMO

Hon. Carolyn Wade

1. Plaintiff, by its attorneys, Baker, Sanders, Barshay, Grossman, Fass, Muhlstock & Neuwirth, submits this memorandum in opposition to the arguments raised by the defendant.

2. The defendant argues that the plaintiff engaged in a referral in violation of Public Health Law 238-a. However, for the following reasons, the defense presented herein by the defendant must fail.

3. Dr. Debbi, the owner of Cambridge Medical, PC ("Cambridge") did testify at her September 10, 2009 deposition that all of Cambridge's ultrasound tests are administered at the offices of the 40 to 45 medical providers who have requested that Cambridge perform these tests on their patients. Dr. Debbi also testified that Cambridge pays a rental fee for the office space use. Defendant, in their trial memo, mischaracterizes these payments as referral fees.

4. The instant case does not fall within the ambit § 238-a of the Public Health Law. The nguage of the statute plainly reads as follows: Prohibition of financial arrangements and ls 1. (a) A practitioner authorized to order ***clinical laboratory services, pharmacy***

services, radiation therapy services or x-ray or imaging services may not make a referral for such services to a health care provider authorized to provide such services where such practitioner or immediate family member of such practitioner has a *financial relationship* with such health care provider. (b) A health care provider or a referring practitioner may not present or cause to be presented to any individual or third party payor or other entity a claim, bill, or other demand for payment for ***clinical laboratory services, pharmacy services, radiation therapy services or x-ray or imaging services*** furnished pursuant to a referral prohibited by this subdivision * * * (emphasis added).

5. It should be noted that the various provisions of § 238-a of the Public Health Law have different effective dates and said section contains a number of exceptions and definitions.

6. Even assuming the services in question fall within the ambit of 238(a), which they do not, Cambridge would be exempt in accordance with Section 3 (i) of § 238-a of NYS Public Health Law which contains the following exception, that a compensation arrangement shall not include:

payments made for the rental or lease of office space, if (A) there is a written agreement, signed by the parties, for the rental or lease of the space, which agreement specifies the space covered by the agreement and dedicated for the use of the lessee, provides for a term of rental or lease of at least one year, provides for a payment on a periodic basis of an amount that is consistent with fair market value, provides for an amount of aggregate payments that does not vary, directly or indirectly, based on the volume or value of any referrals of business between the parties, and would be considered to be commercially reasonable even if no referrals were made between the parties; or (B) in the case of rental or lease of office space in which a practitioner who is an interested investor, or an interested investor who is an immediate family member of the practitioner, has an ownership or investment interest, the office space is in the same building as the building in which the practitioner or group practice of which the practitioner is a member has a practice

7. The rental fee for the office space was paid pursuant to a written and signed agreement for the rental of specified space for Cambridge's use. The lengths of the leases are also

consistent with the statute and the amounts paid are consistent with fair market value. Defendant acknowledges that there are exemptions to §238-a, but they provide no justification why any would not be applicable here.

8. Defendant offers no evidence or proof of any kind, including what would presumably be necessary expert testimony on the issue of per square footage valuation to support their defense.

9. In addition to §238-a, various New York State statutes including N.Y. Education Law §6509-a prohibit fee-splitting by health professionals.

10. The purpose of these sections proscribing fee-splitting by health professionals was to regulate medical facilities supported by New York State Medicaid assistance funds; they were not primarily meant to benefit consumers of medical services generally or private health maintenance organizations. Deutsch v. Health Ins. Plan of Greater New York, 1983, 573 F.Supp. 1443.

11. While it is the established public policy of this State that medical providers may not engage in voluntary prospective fee-splitting arrangements (see, Education Law § 6509-a; 8 NYCRR 29.1 [b]; United Calendar Mfg. Corp. v Huang, 94 AD2d 176), this blanket proscription against fee-splitting does not extend to a licensed professional associated with or employed by a professional corporation formed to provide medical services (see, Education Law § 6509-a; 8 NYCRR 29.1 [b]; Albany Med. Coll. v McShane, 66 NY2d 982; Dolin v Long Is. Jewish Med. Ctr., 139 AD2d 487; cf., Hauptman v Grand Manor Health Related Facility, 121 AD2d 151).

12. Other instances where the court held that a contractual fee arrangement did not constitute an illegal kickback or improper fee splitting include: a psychiatrist who paid 20% of his

fees to medical corporation for admission to a nursing home Hauptman v. Grand Manor Health Related Facility, Inc. (1 Dept. 1986) 121 A.D.2d 151, 502 N.Y.S.2d 1012 and a cardiologist who tried to recover difference between the hospital's billing rate for his services and the contract rate under a theory of quasi contract Zador v. Millard Fillmore Hosp. (4 Dept. 1999) 261 A.D.2d 876, 689 N.Y.S.2d 816

13. Here Defendant cites cases that are factually different and simply states that the amounts paid for rent were an improper referral that violates § 238-a of the Public Health Law. Defendant has not presented any facts that would support this conclusion. As a matter of law, this Court must determine that there is no violation of Public Health Law 238-a and thus payment for services rendered by the Plaintiff is proper.

14. Moreover, and equally important, assuming, *arguendo,* that the defendant's arguments regarding prohibited referrals was valid with respect to the services in this matter, in order to prevail on this argument, the defendant would be required to establish 1) that a practitioner authorized to order the services in dispute, 2) made a referral for these services to the plaintiff and 3) the ordering practitioner has a financial relationship with the plaintiff. PHL 238-a(a). The proof presented herein has not established these facts, as the defendant has not established that the plaintiff has a financial relationship with the referring physician. The only arguable proof of a "financial relationship" are the lease and service agreements. The sublessor and servicer in those agreements is SPA Realty Corporation (see the lease and service agreements previously submitted to this Court in *Cambridge Medical, PC a/a/o Tran v. Allstate Ins. Co.,* index number 68221/09). It has not been established, or even alleged, that SPA Realty Corporation is "a practitioner authorized to order clinical laboratory services, pharmacy services, radiation therapy

services or x-ray or imaging services . . ." nor has it been established, or alleged, that SPA Realty Corporation "ma[de] a referral for such services" performed by the plaintiff. Accordingly, a key element of defendant's defense has not been, nor can it be, established, and therefore, as a matter of law, the defense presented by the defendant herein must fail.

15. With respect to the independent contractor defense and defendant's trial subpoena raised in defendant's trial memo, plaintiff previously complied with the defendant's trial subpoena and permitted defense counsel to inspect the W-2 forms issued by the plaintiff to its technicians. In fact, on the record previously before this Court under index number 68221/09, defense counsel acknowledged compliance with the subpoena and also acknowledged that he was satisfied with the proof presented to him. Defense counsel therefore withdrew that portion of the defense concerning the independent contractor argument.

16. As no other defense has been presented, and as the parties stipulated to plaintiff's *prima facie* case, plaintiff is entitled to judgment as a matter of law for the amount sought in the ad damnum clause, together with statutory interest, attorney fees, costs and disbursements.

Dated: Garden City, New York
April 28, 2011

Steven J. Neuwirth
Baker, Sanders, Barshay, Grossman,
Fass, Muhlstock & Neuwirth, L.L.C.
100 Garden City Plaza - Suite 500
Garden City, New York 11530
(516) 741-4799
BS-3082-903657

To: Short & Billy, PC
Attorneys for Defendant
217 Broadway, Suite 300
New York, NY 10007
(212) 732-3320

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS

CAMBRIDGE MEDICAL, P.C.A/A/O Veronica Paduano

Plaintiff,

Index No. 48277/09

- against -

ALLSTATE INSURANCE COMPANY,

Defendant.

PURSUANT TO SECTION 130-1 OF THE RULES OF THE CHIEF ADMINISTRATOR (22 NYCRR) I CERTIFY THAT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF, FORMED AFTER AN INQUIRY REASONABLE UNDER THE CIRCUMSTANCES, THE WITHIN MEMORANDUM IS NOT FRIVOLOUS.

Notice Pursuant to CPLR 2103(5) declining service by electronic transmittal

---

BAKER, SANDERS, BARSHAY, GROSSMAN, FASS, MUHLSTOCK & NEUWIRTH
Attorneys for Plaintiff
100 Garden City Plaza, Suite 500
Garden City, NY 11530
(516) 741-4799
FAX: (516) 741-0128
Our Case No: **BS-3082-903657**

To: Short & Billy, PC
Attorneys for Defendant
217 Broadway, Suite 300
New York, NY 10007

Attorney for defendant

Service of a copy of the within TRIAL MEMO is hereby admitted.

Dated:

Attorney for Defendant

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS

CAMBRIDGE MEDICAL P.C.
A/A/O Luan Tran

DEFENDANTS
TRIAL MEMO

Plaintiff,

-against-

ALLSTATE INSURANCE COMPANY

Defendant.

POINT 1: THE REFERRAL TO PLAINTIFF FOR ULTRASOUND STUDIES VIOLATES PUBLIC HEALTH LAW, SECTION 238

1.Dr. Debbi, the owner of Cambridge Medical has testified at her Sept. 10, 2009 deposition that all of Cambridge's ultrasound tests are administered at the offices of the 40 to 45 medical providers who have requested Cambridge to perform these tests on their Patients.In return for this referral, Cambridge has testified that it pays the referring provider a rental fee for the office space used, and a monthly service fee for various services and supplies it allegedly received from the referring provider.

2.This referral violates Section 238-a of the Public Health Law and is a complete defense to plaintiff's claim in this action. No denial is needed to defend on these grounds, see OzonePark Medical Diagnostics Assoc.V. Allstate 180 Misc2d 105 (App Term 2d Dept 1999).

3.The defense of improper referral is not a precludable defense, Fair Price v Elrac. 12 Misc3d 119 (App term 2nd & 11th Districts 2006) see Ozone Park v Allstate supra, also, Stand Up MRI v General Assurance 10 Misc3d 551 (Suffolk Dist Ct, 2005).

4.In the recent case of Dr Matrangolo v Allstate , New York Civil # 54569/09, Judge Samuels dismissed plaintiff's complaint based on that plaintiff's failure to disclose the lease agreement with it's referring provider.

5. Section 238-a of the Public Health Law prohibits self-referrals and is specifically applicable to Ultrasound , see section 238-(13g). Section 238-a prohibits referrals to a provider with which the practitioner has a financial relationship, see section 238-a (1)(a). A violation of this defense is a complete defense to a claim for payment of the medical services.

6.While some lease agreements may qualify as "safe harbors" (subsection 5(b)(i) , there is no such exemption for service agreements in Section 238-a.

7.Moreover, Section 238-d requires disclosure to the patients of these financial relationships between Cambridge and its' referring providers. Failure to disclose is a violation which precludes Cambridge from collecting No fault benefits on these ultrasound bills , see Fair Price v Elrac, supra.

8.In prior deposition testimony, Cambridge has admitted making payments to it's referring providers, and, accordingly, the defendant has subpoenaed Plaintiff to produce

the lease/service agreements with the referring provider for the bills at issue, and the financial records that document these payments.

9.Failure to produce these subpoenaed documents is contempt of court and is punishable by striking a party's pleadings, see CPLR 2308.

10. Section 238-a&d of the Public Health Law forbids medical providers from referring patients to other medical providers with whom they have a financial relationship. Plaintiff has violated both the letter and the intent of this statute, and should not be allowed compensation for the tests performed.

POINT II; PLAINTIFF CANNOT COLLECT NO FAULT BENEFITS FOR WORK DONE BY INDEPENDENT CONTRACTORS.

11. If the services were rendered by independent contractors, that disqualifies plaintiff from collecting no fault benefits for those services since the plaintiff is not considered to be the "provider" of those services, see A.B. Medical Services v Liberty Mutual 9 Misc3d 36 (App Term 2d Dept 2005), see also Rockaway Blvd Medical v Progressive 9 Misc.3d 52 (App Term 2d Dept. 2005), East Coast Acupuncture v NY Central Mutual, 2008 NY Slip Op 50344 (U) (App Term , 2d Dept, 2008).

12.Plaintiff has repeatedly refused to disclose the W-2 and/or 1099 forms for the "technicians" who do the actual work. Accordingly, we have subpoenaed the W-2 and/or 1099 Forms that Plaintiff issued in 2009 to these technicians.

13Failure to produce these subpoenaed documents is contempt of court and is punishable

by striking a party's pleadings, see CPLR 2308.

Dated: Feb. 28, 2011
New York, NY

SHORT & BILLY, P.C.

By: Mark A. Puleo, Esq.
Attorneys for the Defendant,
217 Broadway, New York, NY 10007
212-732-3320

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS

CAMBRIDGE MEDICAL P.C.
a/a/o Veronica Paduano

Index 048277/09
DEFENDANTS
TRIAL MEMO

Plaintiff,

-against-

ALLSTATE INSURANCE COMPANY

Defendant.

POINT 1: THE REFERRAL TO PLAINTIFF FOR DIAGNOSTIC TESTS VIOLATES PUBLIC HEALTH LAW, SECTION 238

1.Dr. Debbi, the owner of Cambridge Medical has testified at her Sept. 10, 2009 deposition that all of Cambridge's ultrasound and EMG tests are administered at the offices of the 40 to 45 medical providers who have requested Cambridge to perform these tests on their Patients. In return for this referral, Cambridge has testified that it pays the referring provider a rental fee for the office space used, and a monthly service fee for various services and supplies it allegedly received from the referring provider.

2. In the present action, Cambridge provided ultrasound (echograms) tests at the office of David Shapiro, DC, pursuant to his referral. This referral violates Section 238-a of the Public Health Law and is a complete defense to plaintiff's claim in this action. No denial is needed to defend on these grounds, see Ozone Park Medical Diagnostics Assoc.v. Allstate 180 Misc2d 105 (App Term 2d Dept 1999).

3.The defense of improper referral is not a precludable defense, Fair Price v Elrac, 12 Misc3d 119 (App term 2nd & 11th Districts 2006) see Ozone Park v Allstate supra, also, Stand Up MRI v General Assurance 10 Misc3d 551 (Suffolk Dist Ct, 2005), and can be raised even if no denial was issued, see Ozone Park V Allstate, supra.

4. In the recent case of Dr. Matrangolo v Progressive , NY Civil Court Index 52599/09 Judge Engoron dismissed plaintiff's complaint for failing to disclose the lease in opposition to defendant's summary judgment motion, noting that it is the medical provider's burden to prove that it's lease falls within any safe harbor sections of Section 238-a. .In Civil Queens, Judge Buggs similarly dismissed numerous cases By Dr. Matangolo and Dr. Felderstein for violation of Section 238 of the Public Health Law (see 2 annexed sample decisions), noting that plaintiff had not proven it was exempt from the statute. See also United States v Carlisle HMA 554 F.3d 88 (3RD Circuit Court of Appeals 2009) where the court indicated that the 'burden shifts to the defendant to establish that its conduct was protected by (a statutory) exception." citing United States v Rogan 459 F. Supp.2d 692, 716 (ND.Ill. 2006).

5. Section 238-a of the Public Health Law prohibits self-referrals and specifically mentions Ultrasound as an "x-ray or imaging service covered by the statute , see Section 238(13g). Section 238-a prohibits referrals to a provider with which the practitioner has a financial relationship, see section 238-a (1)(a).A violation of this defense is a complete defense to a claim for payment of the medical Services, since Section238-a (1)(b) indicates that a health care provider or a referring practioner may not present to any

individual or third party payor a claim or bill for services furnished pursuant to a referral prohibited by this statute.

6.While some lease agreements may qualify as "safe harbors" (subsection 5(b)(i) , there is no such exemption for service agreements in Section 238-a. Cambridge has admitted that it has service agreement with all its referring providers. The service agreement is a per ser violation of the statute, since there is no "safe harbor" provision in the statute for any type of service agreements.

7.Moreover, even if the referral for a particular service or test does not fall within the list of prohibited referrals listed in Section 238-a, for all other types of referrals (ie: EMG testing) Section 238-d requires written disclosure to the patients of the financial relationships between Cambridge and its' referring providers for the EMG tests it performs Failure to disclose is a violation which precludes Cambridge from collecting No fault benefits on those bills , see Fair Price v Elrac, supra. Cambridge has not disclosed it's financial relationships for either ultrasound or EMG testing,

8. In prior deposition testimony, Cambridge has admitted making these payments to it's referring providers, and, accordingly, the defendant has subpoenaed Plaintiff to produce the lease/service agreements with the referring provider for the bills at issue, and the financial records that document these payments.

9.Failure to produce these subpoenaed documents is contempt of court and is punishable by striking a party's pleadings, see CPLR 2308.

10. Section 238-a&d of the Public Health Law forbids medical providers from referring patients to other medical providers with whom they have a compensation arrangement or financial relationship. Plaintiff has violated both the letter and the intent of this statute, and should not be allowed compensation for the tests performed.

Dated: April 12 2011
New York, NY

SHORT & BILLY, P.C.

By: Mark A. Puleo, Esq.
Attorneys for the Defendant,
217 Broadway, New York, NY 10007
212-732-3320

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 41

----------x

DR. STEPHEN MATRANGOLO, D.C., P.C. a/a/o David Fitzhugh,

Plaintiff,

- against -

PROGRESSIVE CASUALTY INS. COMPANY,

Defendant.

----------x

Index Number: 52599/09

Decision and Order

Arthur F. Engoron, Judge

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 3, were used on this motion by defendant for summary judgment and other relief:

	Papers Numbered:
Moving Papers	1
Opposition Papers	2
Reply Papers	3

Upon the foregoing papers, the instant motion is granted.

Background

Public Health Law § 238-a(1), as effective December 8, 2002, provides that "[a] practitioner authorized to order . . . physical therapy services . . . may not make a referral for such services to a health care provider . . . where such practitioner . . . has a financial relationship with such health care provider." This statute does not cover the following (§ 238-a(5)(b)(I)):

> payments made for the rental or lease of office space, if (A) there is a written agreement, signed by the parties, for the rental or lease of the space, which agreement specifies the space covered by the agreement . . . provides for a term of rental or lease of at least one year, provides for a payment on a periodic basis of an amount that is consistent with fair market value, provides for an amount of aggregate payments that does not vary, directly or indirectly, based on the volume or value of any referrals of business between the parties, and would be considered to be commercially reasonable even if no referrals were made between the parties.

In the instant case, plaintiff has admitted that he rents professional space from the physician(s) who made the subject referrals. In particular, at a 3/12/07 deposition (Moving Exh. 6) , plaintiff testified (at pp. 11-13) that he regularly performers services outside of his home office, that he leases space from the referring doctors, that he has written leases, that they are yearly, that the rental amount is

not contingent on the number of referrals, that the leases indicate the rental amount, and that the rental amount is fair market value.

Discussion

This Court believes that Public Health Law § 238-a has an obvious and salutary purpose: to prevent the provision of health care from being based on financial incentive rather than patient welfare and medical necessity. The instant case implicates this issue, as plaintiff rents space from his referring physicians. Plaintiff claims that he falls within the statute's clearly-delineated "safe harbor." However, in opposition to the instant motion, he has failed (one might say "refused") to produce the best evidence, evidence within his possession, on that issue.

At oral argument plaintiff contended that the burden is on defendant to prove that he has run afoul of the Public Health Law. On a formal level, this Court believes that defendant has made out a prima facie case of a violation, because of the rental, and that the burden has shifted to plaintiff to prove inclusion within the safe harbor. On a less formal level, this Court does not believe in "ha ha, gotcha" litigation; if plaintiff seeks to rely on his written leases, let him provide them. As he has chosen not to do so, and as a violation of the statute is a complete bar to payment, whether or not the subject of a denial, plaintiff is not entitled to reimbursement; defendant is entitled to summary judgment dismissing the instant action; and the clerk is hereby directed to enter judgment accordingly.

Dated: December 1, 2010

Arthur F. Engoron, J.C.C.

Civil Court of the City of New York

County of Queens

Part 41

Index Number 12 43161/09

Motion Cal. # 100 Motion Seq. #

Dr STEPHEN MATRANGOLO
A/o Crystal Robles

Claimant(s)/Plaintiff(s)/Petitioner(s)

against

ALLSTATE INSURANCE, CO

Defendant(s)/Respondent(s)

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion:

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Order to Show Cause and Affidavits Annexed.....	
Answering Affidavits	2
Replying Affidavits.....	3
Exhibits	
Other.....	

Upon the foregoing cited papers, the Decision/Order on this Motion to for Summary Judgment is granted in favor of Defendant ~~as follows:~~ for violation of Public Health LAW 238-a which Proscribes financial arrangements between referring providers and treating providers, ~~which~~ Defendant has submitted admissible evidence in form of a transcript of an EUO of Dr Matrangolo & other ev. re. Confirming that he has a lease agreement with his referring providers, Dr Matrangolo confirms the relationship in an affidavit of Dr Matrangolo submitted in opposition to Defendant's motion. Plaintiff did not substantiate its lease arrangement qualified for an exception under public Health L[illegible]

Civil Court of the City of New York
FEB 1, 2011
ENTERED
QUEENS COUNTY

FEB 16 2011
Date

Judge, Civil Court

PAPERS SUBMITTED
SPECIAL TERM
FEB 16 2011
CIVIL COURT - QUEENS CO.

FILE 26698

Civil Court of the City of New York

County of Queens

Part 41

Index Number 13120109

Motion Cal. # 114 Motion Seq. #

Dr. Marc Feldgarten a/a/o Kevin Lazo

Claimant(s)/Plaintiff(s)/Petitioner(s)

against

ALLSTATE INSURANCE, CO

Defendant(s)/Respondent(s)

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion:

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Order to Show Cause and Affidavits Annexed.....	
Answering Affidavits	2
Replying Affidavits.....	3
Exhibits	
Other.....	

Upon the foregoing cited papers, the Decision/Order on this Motion to for Summary Judgment is granted in favor of Defendant ~~as follows~~ for violation of Public Health LAW 238-a which Proscribes financial arrangements between referring providers and treating providers, ~~which~~ Defendant has submitted admissible evidence in form of a transcript of an EUO of Dr Matrangolo & other confirming that he has a lease agreement with his referring providers, Dr ~~Matrangolo~~ Feldgarten confirms this relationship in an affidavit of Dr ~~Matrangolo~~ Feldgarten submitted in opposition to Defendant's motion Plaintiff did not substantiate its lease arrangement qualified for an exception under public Health Law

Civil Court
City of New York
ENTERED
QUEENS COUNTY

FEB 16 2011

Date

Judge, Civil Court

CIVIL COURT - QUEENS CO.
FEB 16 2011
CIVIL TERM

CIVIL COURT

CP-85 Revised September 1999

File 26876

EXHIBIT 9

CIVIL COURT OF THE CITY OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. PETER H. MOULTON PART 61
Civil Court Judge

Dr. Steven Matrangelo, D.C. P.C., a/a/o Judy Alberto-Francis,

Index Number 060409/09

Plaintiff,

against

Allstate Ins. Co.,

Defendant.

DECISION AND ORDER AFTER TRIAL

27732/MSK

SHORT FORM P.C.

OCT 14 2011

This first party no-fault benefits action was tried before the court on July 28, 2011.[1] Neither party called any witnesses. The plaintiff attempted to prove its prima facie case by defendant's responses to its interrogatories. Defendant argued that plaintiff failed to demonstrate at trial that its lease agreement with the referring physician falls within the "safe harbor" provision of Public Health Law § 238-a. Section 238-a bars referrals where the two physicians involved have a "financial relationship." The safe harbor provision provides an exception to that prohibition. Defendant further argued that plaintiff's principal's failure to attend trial pursuant to a subpoena fatally compromised its ability to refute plaintiff's safe harbor defense.

Defendant argued as a threshold matter that plaintiff was unable to prove its prima facie case because defendant's interrogatory responses do not establish that payment is "overdue." Defendant is correct that this an element of a plaintiff's prima facie case in a no fault case. (See, eg, Countrywide Ins. Co. v 563 Grand Med., P.C., 50 AD3d 313.) Plaintiff's counsel first appeared to argue that an overdue payment is not part of its prima facie case, and then attempted to use the defendant's denials and verification requests on the various claims to show that the payment was overdue. The demonstration that the payment was overdue could have been achieved much more economically if the plaintiff had brought a witness to trial, but the court nonetheless finds that petitioner established its prima facie case.

Defendant's defense at trial was that Public Health Law § 238-a bars plaintiff's claims. This defense is not waived by failing to assert it in a denial of claim. (Fair Price Medical Supply Corp v ELRAC Inc., 12 Misc3d 119.)

[1]The court was provided with a transcript of this case, but the transcript contains the caption of a case involving the same parties tried later the same day. The caption in the transcript incorrectly reflects that the transcript is for the action under index number 60393/09, with the assignor being Annalouise Davis. As noted in the caption above the index number in this case is 60409/90, and the assignor is Judy Alberto-Francis.

Section 238-a bars referrals where the referring physician has a financial relationship with the plaintiff physician who performs services for the patient, and specifically applies to the type of physical therapy services that are the subject of the bills at issue herein. Here the bills indicates that Dr. Matrangelo provided services to the assignor in the offices occupied by the referring physician. Dr. Matrangelo admitted that he leases space from the referring physician, but plaintiff's counsel argued that the lease falls within the "safe harbor" provision of Public Health Law § 238-a, which states that under certain conditions a lease agreement is not a prohibited financial relationship within the ambit of the statute.

The safe harbor provision, Public Health Law § 238-a(5)(b)(I), provides that the statute's prohibition does not apply to

> Payments made for the rental or lease of lease of office space, if (A) there is a written agreement, signed by the parties, for the rental or lease of the space, which agreement specifies the space covered by the agreement ... provides for a term of rental or lease of at least one year, provides for a payment on a periodic basis of an amount that is consistent with fair market value, provides for an amount of aggregate payments that does not vary, directly or indirectly, based on the volume or value of any referrals of business between the parties, and would be considered commercially reasonable even if no referrals were made between the parties.

Plaintiff provided to defendant the applicable leases after the depositions of Dr. Matrangelo. Defendant was therefore unable to ask Dr. Matrangelo questions about the leases. The parties stipulated to the leases' admission. The leases establish a financial relationship between Dr. Matrangelo and the referring physicians. However, plaintiff failed to establish that the lease agreements were for "fair market value," and that the arrangements were "commercially reasonable." The leases cannot speak for themselves on these points, and, as noted above, plaintiff called no witnesses.

Even if the leases set forth all the elements of a safe harbor exception, defendant's ability to probe plaintiff's evidence on this issue was fatally compromised by the failure of plaintiff's principal, Dr. Steven Matrangelo, to appear at trial pursuant to defendant's trial subpoena. While the first subpoena served on Dr. Matrangelo was defective, and the second possibly not accompanied by the requisite fee, the first two subpoenas provided ample notice that his presence at trial was sought by defendant. He was finally served, on the third try, with a proper subpoena accompanied by the requisite fee.

For the reasons stated I find for the defendant. The clerk shall enter judgment dismissing the complaint.

Dated: October 11, 2011

Peter H. Moulton, *C.C.J.*

HON. PETER H. MOULTON

CIVIL COURT OF THE CITY OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. PETER H. MOULTON PART 61
Civil Court Judge

Dr. Steven Matrangelo, D.C. P.C., a/a/o Annalouise Davis,

Index Number 060393/09

Plaintiff,

against

Allstate Ins. Co.,

Defendant.

DECISION AND ORDER AFTER TRIAL

27025/msk

This first party no-fault benefits action was tried before the court on July 28, 2011. Neither party called any witnesses. The plaintiff attempted to prove its prima facie case by defendant's responses to its interrogatories. Defendant argued that plaintiff failed to demonstrate at trial that its lease agreement with the referring physician falls within the "safe harbor" provision of Public Health Law § 238-a. Section 238-a bars referrals where the two physicians involved have a "financial relationship." The safe harbor provision provides an exception to that prohibition. Defendant further argued that plaintiff's principal's failure to attend trial pursuant to a subpoena fatally compromised its ability to refute plaintiff's safe harbor defense.

Defendant's defense at trial was that Public Health Law § 238-a bars plaintiff's claims. This defense is not waived by failing to assert it in a denial of claim. (Fair Price Medical Supply Corp v ELRAC Inc., 12 Misc3d 119.) Section 238-a bars referrals where the referring physician has a financial relationship with the plaintiff physician who performs services for the patient, and specifically applies to the type of physical therapy services that are the subject of the bills at issue herein. Here the bills indicates that Dr. Matrangelo provided services to the assignor in the offices occupied by the referring physician. Dr. Matrangelo admitted that he leases space from the referring physician, but plaintiff's counsel argued that the lease falls within the "safe harbor" provision of Public Health Law § 238-a, which states that under certain conditions a lease agreement is not a prohibited financial relationship within the ambit of the statute.

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consistent with fair market value, provides for an amount of aggregate payments that does not vary, directly or indirectly, based on the volume or value of any referrals of business between the parties, and would be considered commercially reasonable even if no referrals were made between the parties.

Plaintiff provided to defendant the applicable lease after the depositions of Dr. Matrangelo. Defendant was herefore unable to ask Dr. Matrangelo questions about the lease. The parties stipulated to the lease'sadmission. The ease establishes a financial relationship between Dr. Matrangelo and the referring physicians. However, plaintiff 'ailed to establish that the lease agreements were for "fair market value," and that the arrangements were 'commercially reasonable." The lease cannot speak for itself on these points, and, as noted above, plaintiff called no vitnesses.

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For the reasons stated I find for the defendant. The clerk shall enter judgment dismissing the complaint.

Dated: October 12, 2011

Peter H. Moulton, *C.C.J.*

HON. PE[illegible]

CIVIL COURT OF THE CITY OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. PETER H. MOULTON PART 61
Civil Court Judge

Dr. Steven Matrangelo, D.C. P.C., a/a/o Maria Fernandez,

Index Number 060388/09

Plaintiff,

DECISION AND ORDER AFTER TRIAL

against

Allstate Ins. Co.,

Defendant.

This first party no-fault benefits action was tried before the court on July 28, 2011. Neither party called any witnesses. The plaintiff attempted to prove its prima facie case by defendant's responses to its interrogatories. Defendant argued that plaintiff failed to demonstrate at trial that its lease agreement with the referring physician falls within the "safe harbor" provision of Public Health Law § 238-a. Section 238-a bars referrals where the two physicians involved have a "financial relationship." The safe harbor provision provides an exception to that prohibition. Defendant further argued that plaintiff's principal's failure to attend trial pursuant to a subpoena fatally compromised its ability to refute plaintiff's safe harbor defense.

Defendant's defense at trial was that Public Health Law § 238-a bars plaintiff's claims. This defense is not waived by failing to assert it in a denial of claim. (Fair Price Medical Supply Corp v ELRAC Inc., 12 Misc3d 119.) Section 238-a bars referrals where the referring physician has a financial relationship with the plaintiff physician who performs services for the patient, and specifically applies to the type of physical therapy services that are the subject of the bills at issue herein. Here the bills indicates that Dr. Matrangelo provided services to the assignor in the offices occupied by the referring physician. Dr. Matrangelo admitted that he leases space from the referring physician, but plaintiff's counsel argued that the lease falls within the "safe harbor" provision of Public Health Law § 238-a, which states that under certain conditions a lease agreement is not a prohibited financial relationship within the ambit of the statute.

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Even if the lease set forth all the elements of a safe harbor exception, defendant's ability to probe plaintiff's evidence on this issue was fatally compromised by the failure of plaintiff's principal, Dr. Steven Matrangelo, to appear at trial pursuant to defendant's trial subpoena. While the first subpoena served on Dr. Matrangelo was defective, and the second possibly not accompanied by the requisite fee, the first two subpoenas provided ample notice that his presence at trial was sought by defendant. He was finally served, on the third try, with a proper subpoena accompanied by the requisite fee.

For the reasons stated I find for the defendant. The clerk shall enter judgment dismissing the complaint.

Dated: October 12, 2011

Peter H. Moulton, *C.C.J.*

EXHIBIT 10

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: TRIAL TERM PART 66

DR. STEPHEN MATRANGOLO, DC, PC,
AAO JOSEPH INFUSO
AAO LUIGI FANELLI
AAO GERTINA JACKSON
AAO SALVATORE MUSCARA,

PLAINTIFFS,

-against-

ALLSTATE INSURANCE COMPANY,

DEFENDANT.

INDEX NOS.
CV-012997-09/NY
CV-050716-09/NY
CV-012988-09/NY
CV-012992-09/NY

Continued Bench Trial/Decisions

DATED: Wednesday, January 4th, 2012
111 Centre Street
New York, New York 10013

B E F O R E:
HONORABLE DEBRA ROSE SAMUELS, J.C.C.

A P P E A R A N C E S:

LAW OFFICE OF LEON KUCHEROVSKY, ESQ.
Attorney for Plaintiffs
212 West 35th Street, 16th Floor
New York, New York 10001
BY: MATTHEW K. VIVERITO, ESQ.

SHORT & BILLY, P.C.
Attorneys for Defendant
217 Broadway, Suite 300
New York, New York 10007
BY: MARK A. PULEO, ESQ.
and
CHRISTOPHER O'DONNELL, ESQ.

DeWAYNE SCHMIDT
OFFICIAL COURT REPORT

THE COURT: Here's what was produced pursuant to the subpoena. Take a look at those two leases. There should be at least two. Please have a seat. Luigi Fanelli is the index number 50716 of '09 and the address where services were rendered against for Luigi Fanelli was what?

MR. VIVERITO: One moment, your Honor.

MR. PULEO: 301 Amboy Road, Staten Island New York, 10306.

MR. VIVERITO: 3010 Amboy road, yeah.

THE COURT: Okay.

MR. VIVERITO: And my client and my witness were unable to for whatever reason produce the lease for that location. The only thing I have to say about that, I think I could probably with your Honor's permission a brief closing as to all these matters, but I acknowledge forthwith that there's no lease for that location.

MR. PULEO: And if I may, your Honor, I would just say since we had testimony stating that there are leases or rather financial relationships between the doctor and all of the referring doctors in this matter, in other words, that there is some sort of lease agreement between the doctor, Dr. Matrongolo, and all the providers referred

services to Dr. Matrongolo, and that 238A requires a written lease. If they're stating they don't have a written lease, they're in violation of the Public Health Law and, therefore, it's clear that they can't sustain their case.

MR. VIVERITO: I would dispute that, your Honor, if I may.

THE COURT: Yeah, because?

MR. VIVERITO: I was hoping to save this kind of for collective argument as to why I don't think we should even get, on any of the cases, to a determination of whether we comply with any requirement of the statute. We're skipping a very vital step. That is a simple demonstration undertaken by defendant to demonstrate to this Court in a formal setting how the statute applies to the facts of our cases. Now, the statute that the defendant invokes, because defendant is invoking statute, should be incumbent upon the defendant to demonstrate how it applies. The statute is very specific as to the type of practitioners and the type of medical services to be covered by the statute. For example, X-ray services, ultrasound, imaging services like MRIs.

The type of services that are featured in

these cases have been known to the defendant since way back during the E.U.O. and E.B.T. of Dr. Matrangolo himself, in '07 and '08, and I'd like to point out quickly that that's contemporaneous with most of the cases before you today, three out of the four cases today are 2008 dates of service. He's asked the direct question, I'm not going to say what he says, but he describes what the medical services are, he describes four different types of services. I can say what they are, but I won't at the moment.

If this were an X-ray case we could say definitively without any kind of leg work, well, X-rays is listed right in the statute, of course the statute applies to our set of facts or if it was an MRI case or ultrasound case because it's specifically delineated. But here the types of services aren't the type that are automatically associated with those listed in the statute. I want to bring up very briefly a case that defendant inserts into its own trial memo, the Carolyn Wade case of Kings County where she ruled that plaintiff did violate 238A. But before she got to that part, the Court had to, as I understand it, make certain that the services at issue in that case are the type to be governed by the statute. And since the ultrasound was the subject of

the referral, they can easily associate that with the ultrasonography listed in the statute. Our services, again, are a little bit -- aren't as obvious and aren't as clearly delineated with some other types of services.

MR. PULEO: The witness should be excused rather than be coached on the stand while counsel makes his legal argument, which is completely out of order at this point.

THE COURT: She's just being called for leases. Just finish that and we'll get to that, your next issue. That's it. Finish.

First of all, just let me mark them as a Court exhibit. I have Court Exhibit 2.

MR. PULEO: This is the only one that should be marked for identification.

THE COURT: This is Court Exhibit number 3. Well, let's mark this -- let's mark it Defendant's A in evidence. 1426 Victory Boulevard, Staten Island, New York, lease for the premises, and that's in evidence.

And you could not find a lease, is that right, I'm asking the witness now, who remains under oath, you did not find a lease for 3010 Amboy Road in Staten Island?

THE WITNESS: That was the one that was missing, yes.

THE COURT: And who conducted the search?

THE WITNESS: I did and one of the other workers.

THE COURT: Okay. And where did you search?

THE WITNESS: Wherever we could look.

THE COURT: Okay. What about Dr. Matrongolo, did you look anywhere?

THE WITNESS: We barely keep those reports. He doesn't hold onto those copies, we have them, so we would be the ones that would have them.

THE COURT: Okay. And anyone else other than yourself and this other worker conduct a search?

THE WITNESS: No.

THE COURT: Okay. Now, go ahead, want to ask her about this lease?

DIRECT EXAMINATION

BY MR. PULEO:

Q Let me just give you the lease. Was this the lease that was in affect in October 2008 when the services at issue were rendered?

A Yes, this was from 1/1 of '08 to 12/31 of '08.

Q And who drafted or prepared that lease?

A Not really sure.

Q Are all the leases for the various referring providers the same except for the location and the amount of rent paid? In other words, are the terms of the leases all identical?

A They should be. I'm not really sure.

Q Does that suggest to you that Dr. Matrongolo or someone on his behalf prepared all the leases and gave them to the various referring providers to sign?

A I'm not sure who did them in the beginning. I done the later ones, but I'm not sure.

Q Do some of the leases contain stamped signatures as opposed to actual signatures?

A Some might, yes.

Q This one has an actual signature on it?

A Yes.

Q Do you know what, if any, negotiations took place for this particular lease?

A No, I'm not aware of any of the negotiations, no.

Q Do you know how this particular rental figure of 2400-dollars a year was arrived at?

A It's arrived at through the two doctors with the fair market value.

Q Do you know that or is that your speculation?

A That's what I'm told.

Q Who told you that?

A The doctors.

MR. PULEO: I'll object and move to strike as hearsay.

THE COURT: You're the one who asked.

MR. PULEO: I move to strike the answer.

THE COURT: Who told you was a hearsay question. You asked it. That's the way it goes. Don't ask the question then.

Q Do you have any personal knowledge of how the rent was calculated or what it was based on?

A No, I don't.

MR. PULEO: I have no further questions.

THE COURT: Any questions, Counsel?

MR. VIVERITO: Yes, please, your Honor.

CROSS EXAMINATION

BY MR. VIVERITO:

Q Ms. Ingrassia, were you employed by Dr. Stephen Matrangolo in 2008 and 2009?

A Yes.

Q And isn't it true that part of your duties -- strike that. During those times what was your job title?

A Office manager.

Q Office manager. And what are -- isn't it true

that as part of your duties as office manager was to keep track of the payment of rent as noted in these leases?

A I was responsible for making sure that they were paid each month.

Q And tell us how you went about doing that please?

A We keep a record in the office. It's in the computer and the doctor would give us the checks and we would mail them out.

Q So, you are in charge of making sure that payments go to the referring doctors' locations from Stephen Matrongolo?

A I mail the checks out, yes.

Q Okay. Now, are there any other payments made by Dr. Stephen Matrongolo? In your position as office manager, I'm asking if you have knowledge of this, are there any other payments made by Dr. Stephen Matrongolo to any of the referring doctors or their locations, other than the rent that is stated for instance on that lease before you?

A No, it's just the rent check.

Q Nothing else?

A No.

Q No other payments of any kind?

A No.

Q For supplies?

A No.

Q For utilities?

A No.

Q Okay. Isn't it true that there's a section in the lease before you called utilities?

A Yes, section four.

Q Section four. And isn't it true that the lessor is going to provide --

MR. PULEO: Object to her interpreting the lease, Judge.

THE COURT: Sustained. I'll read the provisions if you want. You can talk to me about that or tell me what is it after you complete your questioning or she can read it to herself.

MR. VIVERITO: This lease is in evidence, correct?

THE COURT: Yeah.

Q Okay. Could you please read number four for us?

A "Utilities. Lessor shall provide all utilities to the premises including electricity, gas, water, air condition and heat in accordance with the seasonal needs of the Lessee and Lessee's employees and invitees. Lessor will provide secretarial staff, use of utilities, telephones, fax, copier machines and supplies."

Q Okay. And how long is the term of the lease before you?

A One year.

Q And isn't it true that the paragraph one states that rent it is to be paid in equal installments of $1,000 a month?

MR. PULEO: Objection, your Honor, leading the witness.

MR. VIVERITO: I'm just asking.

MR. PULEO: It's a false statement to begin with.

THE COURT: All you have to do, what paragraph do you want her to read, please?

MR. VIVERITO: Number one.

THE WITNESS: This is for Dr. Demartinis.

THE COURT: Hold on just a moment.

Q If you can, just read paragraph one of the lease before you. Ms. Ingrassia, would you please read paragraph one on the lease before you?

A "Term and Rent. Lessor demises the above premises for a term of one year, Commencing 1/1/08 and terminating 12/31/08, or sooner as provided herein at the annual rental of $2,400 payable in equal installments of $200 due monthly. The first month's rent shall become due and payable on a prorated basis as of the date that the

lessee receives the necessary licenses and/or permits for the use of the premises as described herein below. All rental payment shall be made to the Lessor at the above specified above."

Q And number 2 please?

A "Use. Lessee shall use and occupy the premises for diagnostic testing. The Lessee will provide all equipment necessary. The premises shall be used for no other purpose. Lessor represents that the premises may lawfully be used for such a purpose."

Q Okay. Thank you. And in your history as office manager back in 2008 and 2009, was there ever a time when a payment was issued from Dr. Matrongolo to the referring doctor at that location that was any different than the rent listed on the lease?

A No, it's only the rent check.

MR. VIVERITO: I have nothing further at this time.

REDIRECT EXAMINATION

BY MR. PULEO:

Q Ms. Ingrassia, you read a portion of the lease that says lessor demises the above premises. Was the entire premises leased out to Dr. Matrongolo?

A No.

Q Just a part of the premises?

A Right.

Q Does the lease specify what part of the premises?

A No.

Q And the diagnostic testing, that's the type of testing that was done on this patient in October of 2008, correct?

A Correct.

MR. PULEO: I have no further questions.

MR. VIVERITO: I have nothing further at this time.

THE COURT: Okay. Thank you. I'll take that. All right. All right. Now, you have no lease for the other case. Now, go ahead, let's hear it. What do you have to say about this? Do you have any other witnesses or is that it?

MR. PULEO: No, I have no further witnesses, Judge.

THE COURT: No further witnesses.

Okay. Now, you get to the issue of -- you rest, that's it?

MR. PULEO: Yes, I rest.

THE COURT: So, now, you get to the issue of whether or not the plaintiff has the last word to make, so let me hear it from the defendant first, why

do you think that this action should be dismissed? First, deal with the issue of were the services provided within the meaning of the statute that you wish to avail yourself of by saying that there was a financial arrangement between the provider of services and the referrer of services. Excuse me, yeah, the referrer of such services. So, tell me again, with respect to Fanelli, first with the issue of Fanelli.

MR. PULEO: I don't think there's been any evidence on Fanelli because we just started that case thirty seconds ago.

THE COURT: Okay. Tell me on Infuso, what on that case exactly what it is that what were the services that were provided?

MR. PULEO: The services that were provided --

THE COURT: Or billed for.

MR. PULEO: Or billed for were the neuromuscular testing under codes 95999 and 95904, which I believe is a current perception threshold test as testified to by whenever Ms. Ingrassia testified last that these are diagnostic tests.

I would refer the Court to two things. Number one, paragraph 13 of my trial memo, where I

specifically address the fact that the section applies to physical therapy services. Plaintiff's counsel has repeatedly tried to misdirect the Court by talking about ultrasound and X-ray imaging, forgetting of course that the statute --

THE COURT: Okay. So let's look. You said section 238A prohibits self referrals specifically applicable to physical therapy which are broadly defined in section 6731A of the New York State Education Law. Now, it's says include the type of test by plaintiff. Who's got a copy of 6731 of the New York State Education Law?

MR. PULEO: I have that, Judge.

THE COURT: All right. So, let's take a look at that and see where neuromuscular testing --

MR. PULEO: It is diagnostic testing. I got it here.

THE COURT: Okay. So, just a minute, let me read it.

MR. PULEO: It will be the first paragraph.

THE COURT: First paragraph says, "The evaluation, treatment or prevention of disability, injury, disease, or other condition of health using physical, chemical, and mechanical means including, but not limited to heat, cold, light, air, water,

sound, electricity, massage, mobilization, and therapeutic exercise with or without assistive devices, and the performance and interpretation of tests and measurements to assess pathophysiological, pathomechanical, and developmental deficits of human systems to determine treatment, and assist in diagnosis and prognosis." Okay. And that's the definition of physical therapy.

Okay. And what you're saying is that these two tests are in connection with the assessment and measurements to assess the pathophysiological --

MR. PULEO: The performance and interpretation of tests and measurements.

THE COURT: Okay. Okay.

MR. PULEO: And I respectfully refer the Court to the cases in my trial memo from Judge Engoron. Particularly, Judge Moulton who specifically said that these types of test specifically apply to the type of physical therapy services that are subject of the bills herein in his decision, which involved, I think, two of the same codes. And we have, somewhere in this pile of paper, the actual bills that Judge Moulton reviewed in arriving at the decision. They are the same Workers' Compensation fee schedule codes for neuromuscular

testing and for current reception threshold test.

THE COURT: Over to you, Counsel, what do you have to say about that?

MR. VIVERITO: First of all I object to defendant trying to establish his defense through another case. We don't know for instance what defendant presented in that case and --

THE COURT: Are you a party in that case?

MR. VIVERITO: No, I don't believe I was, I didn't appear on that case.

THE COURT: Dr. Matrongolo a party in the case?

MR. VIVERITO: Yes, I believe so.

THE COURT: There you go.

MR. VIVERITO: Might have been Dr. Felderstein case.

MR. PULEO: No, Matrongolo case.

THE COURT: Next. Part of your big argument, as I see it throughout this, is that you're talking about how this statute does not apply to this situation because the tests that were administered do not come under the disqualification. In other words, they're not applicable to the preclusion of a financial relationship. That's your argument, right?

MR. VIVERITO: That's one of my arguments,

yes.

THE COURT: So, tell me why.

MR. VIVERITO: You know, I just want to adjust the argument a little bit, it's not that I'm saying that the tests aren't necessarily applicable, I'm just saying that if the defendant is the one invoking the statute, it needs to make a formal demonstration of the applicability of the statute, especially when we're talking about types of services that aren't easily ascertainable by a lay person. If we're talking about neuromuscular testing, I would also think you would need a medical expert to say, well, I reviewed these test results, I know these tests to be X, Y, Z, and I know from my years of experience of classifying and coding certain medical services that these services fall under for instance --

THE COURT: I got your argument.

MR. VIVERITO: That hasn't been done and that's lacking here because we're jumping right to whether we comport with the requirement of the statute.

THE COURT: Next argument which is?

MR. VIVERITO: My next argument is that -- and I have the two other lease agreements, the

original ones for the two other cases that we haven't gotten to yet, and I want to say that if we go line by line by the Safe Harbor provisions in the statute, from the testimony of Ms. Ingrassia, the only payment made by Dr. Matrangolo to any of the referring doctors is the rent and that payment is always consistent with the rent listed on the lease.

THE COURT: But you know that there are cases that say that the burden of proof once establishing a financial relationship the burden of proof is to prove fair market value shifts back over to the plaintiff. Do you think that's not the proper interpretation of what should go on in these trials?

MR. VIVERITO: I do in a sense, your Honor. I think that what was the whole purpose of like exchanging discovery for the last two years and subpoenaing witnesses, if basically what defendant is going to do in Court, just to come into Court and say, you go, you prove everything, you prove why you're entitled to X, Y, Z, what was the whole point of exchanging materials? Defendant has been in possession of all the materials since 2010, albeit copies, that's what they were asking for and they sit there are and do nothing with it.

THE COURT: They did something, they found

object, Judge.

MR. PULEO: I object.

THE COURT: Now, let's move on.

Do you have any case laws that shifts the burden or keeps the burden on the defendant to come forth with proof, affirmative proof, that fair market value has to be established -- or the lack of fair market value has to be established by the defendants? If you have a case that tells me that the fair market value must be established as part of the defendant's case, then that I can read. Otherwise, the only things I'm reading says the burden shifts back to the plaintiff to say that it's fair market value. Do you have a case?

MR. VIVERITO: I don't, your Honor, but I want speak to what you just said. You said if we say fair market value, and we did in two depositions, wait a second, we did in two depositions, when that question was directly asked, how do you decide on the rent for your various leases?

THE COURT: Fair market value is not established by the parties. The fair market value is established by the use of an expert witness, the use of a realtor or other leases inside the building. It's not an answer to say did you negotiate the

lease, but that burden is on you to come back on your side of the case then, you know, to the extent that you're permitted to use a deposition, which I don't think you'll be able to in this case, certainly not Dr. Matrongolo when he hasn't appeared.

MR. VIVERITO: It's monumentally unfair to say that I need to present live witness testimony on the issue of fair market value, if you're not going to demand the same of defendant.

THE COURT: I haven't said anything about that.

MR. VIVERITO: I don't have a case on that.

THE COURT: You don't have any case that says the burden is shifted over to you?

Now, let's move on.

MR. VIVERITO: I have evidence of fair market value before me. I have evidence of what fair market value is in the region.

THE COURT: If you want to go back into your rebuttal, then we're not having closing argument here, you want to present evidence saying that this is fair market value that's something else entirely.

MR. VIVERITO: Just for the Court's edification.

THE COURT: It's not edification. It's

part of your case. The case is over. I'm listening to closing argument. If you're going to present additional evidence, then we went a bit out of whack, but I'll come back over to you and you'll put in your rebuttal evidence to the extent it's admissible.

MR. VIVERITO: All I have here is that -- this is what I could come up with, as far as the lease of office spaces for doctors in the Staten Island area, and I found that, you know, where a thousand square feet is concerned --

THE COURT: You can't put that in. You're not an expert. I'll mark it for identification. It's totally hearsay. You can't cross examine it. You don't know where it came from. If you want, I'll mark it as Plaintiff's 1 for identification.

MR. VIVERITO: It does give some indication that our leases of not out of the scope of what fair market value is.

THE COURT: That's called Plaintiff's 1 for I.D., that's it, from like an office search.

MR. VIVERITO: From the internet.

THE COURT: Conducted on 12/19/2011. I believe the services were rendered when?

MR. PULEO: 2008.

THE COURT: So, in any event, this wouldn't

be relevant because what is '11 compared to what is 2008 is something else. So, this is Plaintiff's 1 for identification. Not into evidence.

Okay. Now, tell me what neuromuscular testing code 95999, why you don't think that fits into the category of testing that is under the New York State Education Department Law. I mean, yeah, why it is that that is not considered to be, if you know, measurements to assess pathophysiological and pathomechanical and developmental deficits of human systems?

MR. VIVERITO: Your Honor, that's my whole point, I don't need to make that determination one way or the other. I'm saying that the defendant invokes the statute. It's incumbent upon the defendant to demonstrate to this Court why neuromuscular testing does apply to the statute that they're invoking. I don't have to prove why it doesn't.

THE COURT: I got your point.

Now, let's go back over to you for a moment. Did anyone define what neuromuscular testing is? What is neuro --

MR. PULEO: Well, the witness called it a diagnostic test. The lease calls it a diagnostic

test.

MR. VIVERITO: A lay person with no medical training.

MR. PULEO: Judge Engoron and Judge Healy all found these specific testings to be within the scope of the statute. Matter of fact, what I have --

THE COURT: Just tell me, what is neuromuscular testing? What does it mean when something is pathophysiological?

MR. PULEO: Pathology is pathology.

MR. VIVERITO: Objection. Defendant is trying to characterize our medical services without an expert witness to carry that out.

THE COURT: I'm just asking about whether or not there's a layman's interpretation of that that I can figure it out for myself without the use of expert people about whether neuromuscular testing falls in this category.

MR. PULEO: It's a diagnostic test by their own admission.

MR. VIVERITO: By whose admission? An office manager's admission? They don't have medical training.

MR. PULEO: By the Workers' Compensation code as well, which I'll offer into evidence as the

definition of those tests.

MR. VIVERITO: I object to the admission of that.

THE COURT: I can take judicial notice of the statute. I don't need to have that in evidence. Let me see and see if it sheds light on what neuromuscular testing is. Code 95999. Unlisted neurological or neuromuscular diagnostic procedure. And 95904?

MR. PULEO: You have to read that in conjunction with 95900 and 95904 is a sensory nerve version of that test.

THE COURT: Says nerve conduction amplitude latency velocity studies of each nerve without F wave study. 95093 is a procedure with F wave study. And 95904 is sensory.

MR. VIVERITO: Your Honor, the statute is chalk full definitions of the various medical services. I don't find those terms in there. I'm just saying that would necessitate the appearance of someone who is an expert, whether it's a coder or a medical doctor.

THE COURT: All right. So, anything else you want present with respect to this case, 12997?

MR. PULEO: I'd also offer to the Court as

an exhibit, Judge Moulton's decision, along with a copy of the complaint in that action, which annexed the various bills at issue in that action, in which Judge Moulton found specifically fit the definition of physical therapy services under the statute, and as you can see there were three different Workers' Compensation codes that apply to that case. Two of them are the same as the case at issue here.

And Judge Engoron and I think Judge Healy similarly found that the services rendered by Dr. Matrangolo were within the scope of the statute.

MR. VIVERITO: Your Honor, when you're talking about making a demonstration for the Court, if you're invoking a statute, you know, it doesn't matter what happened in another trial, you still have to make that determination. There has been no motion to consolidate these matters with other Dr. Matrangolo matters. Who's to say what kind of demonstration defendant made in that case. But if there was no demonstration made, with all respect, it was inappropriate for any Judge to assume that the statute applies without an actual formal demonstration, given the fact that the testing is of such a nature that it is impossible to just say, oh, xray services, boom, there it is. It takes more

effort than that and more work. I'm not sure whether the statute applies and defendant is not demonstrating that and is jumping ahead to putting us against the wall to demonstrate X, Y, Z.

MR. PULEO: I don't know how much more specific I can demonstrate it by showing several cases involving the same parties and the same tests which have been specifically found to be within the statute. That's collateral estoppel.

THE COURT: This action here, I'm dismissing this action. It's dismissed. I'm finding that there was a financial relationship. I'm finding the testing involved comes under the applicability of 238A and for those reasons the case is dismissed with prejudice.

I don't think I need neuromuscular testing and the performance and interpretation of tests and measurements to assess pathophysiological, pathomechanical, and developmental deficits of human systems to determine treatment, and assist in diagnosis and prognosis. I think I'm sufficiently intelligent, even as a layman, to know that's what that is. So, that's my determination. You can take it up with the Appellate Term.

MR. VIVERITO: Note my exception, your

that a misinterpretation or wrongful interpretation of the burden of proof in these cases?

MR. VIVERITO: Well, it is when you consider the defendant presents no evidence as to an analysis of what's happening here. If the defendant wants to claim a deviation, shouldn't it present some kind of theory?

THE COURT: All they have to do is say you have an economic relationship. They've met that burden. Is it wrong? Is their view wrong on the law that then the burden of proof shifts back to the plaintiff when they want to invoke the Safe Harbor provision, doesn't that burden then fall on you to show that this is a bona fide lease at a fair market value? That's a wrong recitation of the law.

MR. VIVERITO: First of all, on the side that it's not wrong, I'm going to say that through two depositions when our client was -- don't interrupt me.

MR. PULEO: I object. The document is not in evidence.

THE COURT: You're getting too agitated.

MR. PULEO: You're not a sworn witness giving testimony.

THE COURT: All you have to say is I

Okay. Thank you.

MR. O'DONNELL: Can you say that again?

(Matter adjourned.)

REPORTER'S CERTIFICATION

Certified to be a true and accurate transcript of the original stenographic notes.

DeWAYNE SCHMIDT

OFFICIAL COURT REPORTER

out that you have a financial relationship with the referring provider. That's why you have the leases exchanged. So, that's why they need to that do.

MR. VIVERITO: They needed to conduct an EBT and EUO, right. But my point is the -- let me just back up for a second. If you're not even going to present a theory as to where you think the malfeasance lies, again, have some theories for us, your Honor, for the Court, I'm saying that I have looked at these leases and I think this rent is astronomically high and low. Where is the theory of the maleficence?

THE COURT: You're trying to change the burden of proof that shifts back over to you. Their prima facia case of an economic relationship which is prohibited and they have shown the economic relationship, the burden then shifts back over to the plaintiff to say now it's fair market value. Do you think that's wrong? You can say it's wrong because you don't believe in it, but I mean is it wrong because it's just the wrong recitation of the burden of proof?

MR. VIVERITO: I think it's wrong in the sense that --

THE COURT: I just want to know how, is

Honor.

THE COURT: I know. So, it's dismissed with prejudice. Okay. That's that one. Let's get to the next one.

MR. VIVERITO: All I have is these two other leases for the two other premises.

THE COURT: Let's talk about the one where you don't have the lease. Now, let's get to that one. Index number 50716. That's for the Amboy Avenue location. You have a financial relationship which she testified to. You have to have a lease. If you want to fall under the exception, you're supposed to produce a lease. You haven't produced a lease. And, actually, you really haven't explained a sufficient explanation as to the search for the lease. There might be an office manager or someone else, Dr. Matrongolo, who's a party on the lease, say that he even conducted a search for the lease.

MR. VIVERITO: The reason why we don't have him here is because he wasn't properly subpoenaed. That's why he's not here.

THE COURT: You needed to produce the lease in evidence. Produce the lease. That would be a good thing to do, to say that he searched for it and couldn't produce the lease. That would be a good

thing to do. But, you know, he's not here, you don't have the lease.

Now, services, let's get to the issue of whether those services come under the statute. What services were provided in this case?

MR. O'DONNELL: I have copies of the summons and complaint in this matter. The bill is attached to the summons and complaint.

THE COURT: What is that called?

MR. O'DONNELL: That's the neurological procedure that was shown to the Court in the last matter.

THE COURT: Anything else, other than that?

MR. O'DONNELL: I believe that's the only bill.

THE COURT: All right. My same holdings then. And I do think the statute applies. I do think it comes under the New York State Education Law 6731. I think other judges have found that too. And there's no lease, which they're entitled to have, and there's been no rebuttal, in any event, even in the absence of a lease, as to the fair market value. So, this case is dismissed with prejudice.

THE COURT: Gertina Jackson now. Did you get the original?

MR. O'DONNELL: Here's the original lease.

THE COURT: Original lease. Okay. So that's going to be deemed marked as Defendant's A in evidence. Original lease. Have you examined it against the copies you received?

MR. O'DONNELL: That's what I'm doing right now and it should match up. Just want to make sure we got the dates of service right. September, 2008. Okay. September, 2008. So that would fall within the scope of this one.

THE COURT: So, I'll just mark the back of it. I'll call it Defendant's A in evidence.

Now, on this one, you have a stipulation of facts as to the -- as to the claims being submitted, the claims being denied, you know, everything except the issue of whether or not there's a financial relationship between the parties? Are you stipulating to any of that?

MR. VIVERITO: I'm stipulating to everything except there's applicability of the facts and financial relationship.

THE COURT: So, this is 1955 Merrick Road and the services that were provided you stipulated or billed for?

MR. VIVERITO: Are also code 95999.

THE COURT: With respect to -- we have the economic relationship established by the lease. And your argument, you want to just make a record again on that, about the argument that 95999 should not apply to the New York State Education Law and therefore not apply to section 238 of the Public Health Law.

MR. VIVERITO: That's not exactly what I want to argue. I want to argue that it's not our objective to make the determination. I don't know whether they apply or not. But since it's the defendant that invokes the statute, it should be a fundamental premise when you get to Court to make a formal demonstration with admissible evidence that the testing featured in our cases is applicable to the testing in the statute.

Now, what I find very kind of confusing and perplexing about these proceedings, while I may have been required to make that kind of formal demonstration with admissible evidence and maybe even an actual witness who might possess fair market knowledge, defendant however is not put to that test of doing anything but presenting materials for your Honor to interpret. I don't think it's the court's job to make those kind of interpretations or those

kinds of demonstrations. That's defendant's job. They're the one invoking the statute. They glossed over that part of the equation. They want to jump right to putting us against the wall to make a demonstration of everything under the sun and I think it's totally, completely backwards is what their burden should be, and they haven't even presented one piece of admissible evidence to connect the services in our case to the statute.

THE COURT: You think that a layman, even as myself, and just in reading the statute, the physical medical fee schedule under the Workers' Compensation Law, coupled with the Public Health Law is sufficiently simple enough for me to determine that those would come under -- that 95999 comes under the definition of pathophysiological and pathomechanical and developmental deficits of human system, that that's sufficiently clear that I can make that determination without the use of medical testimony?

MR. VIVERITO: No, I don't, your Honor.

THE COURT: Not you, I'm asking defendant. Does he think that that is sufficiently clear for the description of the test, coupled with the perusal of the definition of physical therapy as defined in the

Education Law is sufficient enough without the use of medical testimony, is that what your view is?

MR. O'DONNELL: I believe that the statute is self evident that it encompasses the type of diagnostic tests, self-proclaimed diagnostic tests that the plaintiff has rendered in this case, and in the other cases that have come before the various courts, all of whom have found that these services fit within that definition of physical therapy services.

MR. VIVERITO: Your Honor, I'm asking the Court to use the same common sense in connecting the dots in that forum. Then I would ask the Court to use the same logic and look at an amount as recorded on a lease and make a common sense determination of fair market value and if it does, how does it do it. And we're just twisting in the wind here. I just think that if we're going to use common sense in one area, we should use it in another or not all and hold everybody to the same standard. I shouldn't be forced to demonstrate fair market value to the black T, if they're not held to the same requirement with regard to demonstrating applicability with live testimony, your Honor.

THE COURT: Okay. You know what I'm going

to do in all of these cases, I'm going to leave the door open for you. If for some reason my common sense or my ability to read or interpret this language in Workers' Compensation or under the Education Law is so wrong and you come forth with some affidavit that says that these neuromuscular tests, neurological and neuromuscular diagnostic procedures are not made in connection with testing and measuring pathophysiological or pathomechanical deficits, then I will reconsider my decision.

If it falls under some other category or that my application of the reading and common sense under the statute is so wrong, I will open the opportunity to you, if you do so within the next 30 days, to come to Court and show me that I have misinterpreted the words pathophysiological, pathomechanical, as it applies to measurements or tests of the neurological or neuromuscular diagnostic procedures about which this case is, because I don't think I have to necessarily be a medical expert and maybe I'm too haughty about my own skills in reading. So, I will keep that opportunity open to you.

MR. O'DONNELL: I can't cross examine on that.

THE COURT: I know you can't, but then I

will open it up and I what I might do is and actually if someone has the nerve to put that inside an affidavit, I might actually reconsider the possibility that my layman's understanding of those words might be wrong, then I might ask you to reopen this case and you'll bring in your doctor to say that that is a classic neuromuscular and then everyone will put in their affidavits and their testimony and go in front of whatever boards they have, if that's so wrong, I give you the possibility that it's so wrong, someone will have to sign an affidavit as a doctor to say that that's not a test of the -- neuromuscular diagnostic procedure is not a test of your pathophysiological system.

MR. VIVERITO: Thank you very much, your Honor, for that. I just want to make it clear that that doesn't change my argument that it's defendant's objective to make that determination.

THE COURT: I think that's sufficient. I think the window of opportunity, if you think it exists, and if someone is willing to sign an affidavit that says that, and they're a doctor, and I mean a doctor that does this type of medicine, not just, you know, I mean --

MR. VIVERITO: Our client?

THE COURT: Well, I mean, you know, if it's your client, that's says, oh, no, and he says what it is, that it is, and what it is defined as a test of, and he explains why it is not a pathophysiological or pathomechanical test, then I will think about that, not just come to a conclusion that it is not a pathophysiological test in my medical opinion, he'll have to say why it is and what it is, and if someone's willing to put that in writing and sign their name to it and swear on it, then I will consider the possibility that I have, as not an M.D, misread the statute, but that's what you're going to have to do in the motion in the next 30 days to reargue or renew and I'm giving you that opportunity only in the next 30 days.

MR. O'DONNELL: Now, your Honor, do --

THE COURT: That's dismissed with prejudice. This action is dismissed with prejudice for all the reasons I state on the record.

MR. PULEO: My understanding is that motion must be filed within 30 days?

THE COURT: Has to be served. Just served within 30 days with the attached affidavit on all of those cases that I have just done because. I can be wrong at times, even on a Matrangolo case, which I

believe I was at one point.

MR. VIVERITO: May I get a copy?

THE COURT: They're part of the Workers' Compensation Statute fee schedule on the Workers' Compensation Statute and it's McKinney's Education Law, Section 6731.

THE COURT: Okay. So, now we go to this case and you have the stipulation as to the services that were provided, that the bills were sent, and they were denied. The only issues are the economic relationship between the provider, Dr. Matrangolo, and the referring physician, and let's start with what is the code for the tests that were performed?

MR. VIVERITO: 95999.

THE COURT: Okay. And with respect to the lease, is the lease here for that location?

MR. VIVERITO: Yes, your Honor.

MR. O'DONNELL: Yes, it is, your Honor, and I have examined it, and it matches the copy provided.

THE COURT: Very good. So, let's mark that lease as Defendant's A in evidence. It will be Defendant's A in evidence.

Okay. Now, as in the other case, my view is that the burden then shifts to come over to the plaintiff to say whether or not this lease

constitutes fair market value for the space that is rented for the period of March 1st, '08, terminating in March 1st, '09.

For the purposes of an appeal, do you want your -- that in evidence, your downloaded internet search as of December, 2011, which I would just deem marked in this case again as Plaintiff's 1 for identification, if you want that. Do you want that deemed marked?

MR. VIVERITO: Yes.

THE COURT: It's not coming into evidence because it's a 2011 search. Doesn't apply to the period at issue. And it is also rank hearsay in terms of the quality or the admissibility of the document itself.

And now we get to the issue of 95999. Your view, defendant, is that, correct me if I'm wrong, as it was in the other cases we did today, that 95999 is -- if I read the medical fee schedule of the Workers' Compensation fee schedule, I can see that 95999 relates to the nerve conduction amplitude latency velocity study each nerve motor without F wave studies.

MR. O'DONNELL: Respectfully, your Honor --

THE COURT: Pardon me. Excuse me. All

right. Let's strike that. 95999 is unlisted neurological or neuromuscular diagnostic procedure and it's your view that even a layman such as myself can find that this falls within the ambit of the --

MR. O'DONNELL: Education Law.

THE COURT: Did I get that back, the New York State Education Law, section 6731? And if I read that statute in connection with section 238 of the New York State Public Health Law, I find that this is a procedure -- your argument is that I should find that this is a procedure which is therefore subject to section 238 of the Public Health Law and so your view, Counsel, go ahead, and did I accurately --

MR. O'DONNELL: Yes, absolutely, your Honor.

THE COURT: Now, your view, Counsel, is, and go ahead and tell me.

MR. VIVERITO: Just briefly, your Honor, that defendant hasn't properly demonstrated the applicability of the statute to the set of facts of this case, specifically, type of tests that were performed. I think that is, with all respect to your decision, I think that an expert is required to connect the definition of physical therapy to the

type of services performed in this case. Our client is not a physical therapist. I don't know why there could ever be an interpretation that he performs physical therapy and that if defendant fails to make that determination we don't even get to whether or not we comport with the requirements of the statute.

Thank you, your Honor.

THE COURT: Okay. All right. Well, I am sticking with the theory of the other decisions that I have made today, which is that 95999 does fall within the category of procedures which are covered by section 238 of the Public Health Law and therefore the action is dismissed with prejudice, but without prejudice for you to come forth to me within the next 30 days, if you want, Counsel, if there is an affidavit that shows me that I have not made proper interpretation, an affidavit of a medical professional, a doctor, M.D., that says that that does not constitute -- this 95999 does not constitute a test of the -- get the right words again, of the -- I gave up my insurance law to you. Where is the insurance law? Did you give that back to me, 6731?

MR. O'DONNELL: I have extra copies of it. You want the definition of physical therapy?

THE COURT: Yes, because I have to

reference it here. Okay. So, if you have a medical professional that defines -- that says that with respect to the procedure 95999 that that is not to test for the performance and they're not interpretive tests and measurements to assess the pathophysiological and pathomechanical and developmental deficits of the human system in order to determine treatment, well, then I will reconsider, but I will probably just open the trial again for the defendant to come forth with their expert and then for to you bring in your expert. But that would be the sole extent to what I would do if you come forth with a -- not a non conclusory, okay, affidavit, which fully explains what those tests are and why they do not test and measure pathophysiological and pathomechanical deficits.

MR. VIVERITO: Now, it must be an M.D. even though our client is a D.C.?

THE COURT: No, I think that would be okay. If they can perform those tests, then a Doctor of Chiropractic, you're right, can then put forth -- and make sure it's an affidavit, not an affirmation, an affidavit that says why it is, that this is not a test that measures the pathophysiological and pathomechanical deficits, if someone will sign that.

EXHIBIT 11

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 41

---x

DR. STEPHEN MATRANGOLO, D.C., P.C. a/a/o
David Fitzhugh,

Plaintiff,

- against -

PROGRESSIVE CASUALTY INS. COMPANY,

Defendant.

---x

Index Number: 52599/09

Decision and Order

Arthur F. Engoron, Judge

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 3, were used on this motion by defendant for summary judgment and other relief:

	Papers Numbered:
Moving Papers	1
Opposition Papers	2
Reply Papers	3

Upon the foregoing papers, the instant motion is granted.

Background

Public Health Law § 238-a(1), as effective December 8, 2002, provides that "[a] practitioner authorized to order . . . physical therapy services . . . may not make a referral for such services to a health care provider . . . where such practitioner . . . has a financial relationship with such health care provider." This statute does not cover the following (§ 238-a(5)(b)(I)):

> payments made for the rental or lease of office space, if (A) there is a written agreement, signed by the parties, for the rental or lease of the space, which agreement specifies the space covered by the agreement . . . provides for a term of rental or lease of at least one year, provides for a payment on a periodic basis of an amount that is consistent with fair market value, provides for an amount of aggregate payments that does not vary, directly or indirectly, based on the volume or value of any referrals of business between the parties, and would be considered to be commercially reasonable even if no referrals were made between the parties.

In the instant case, plaintiff has admitted that he rents professional space from the physician(s) who made the subject referrals. In particular, at a 3/12/07 deposition (Moving Exh. 6) , plaintiff testified (at pp. 11-13) that he regularly performers services outside of his home office, that he leases space from the referring doctors, that he has written leases, that they are yearly, that the rental amount is

not contingent on the number of referrals, that the leases indicate the rental amount, and that the rental amount is fair market value.

Discussion

This Court believes that Public Health Law § 238-a has an obvious and salutary purpose: to prevent the provision of health care from being based on financial incentive rather than patient welfare and medical necessity. The instant case implicates this issue, as plaintiff rents space from his referring physicians. Plaintiff claims that he falls within the statute's clearly-delineated "safe harbor." However, in opposition to the instant motion, he has failed (one might say "refused") to produce the best evidence, evidence within his possession, on that issue.

At oral argument plaintiff contended that the burden is on defendant to prove that he has run afoul of the Public Health Law. On a formal level, this Court believes that defendant has made out a prima facie case of a violation, because of the rental, and that the burden has shifted to plaintiff to prove inclusion within the safe harbor. On a less formal level, this Court does not believe in "ha ha, gotcha" litigation; if plaintiff seeks to rely on his written leases, let him provide them. As he has chosen not to do so, and as a violation of the statute is a complete bar to payment, whether or not the subject of a denial, plaintiff is not entitled to reimbursement; defendant is entitled to summary judgment dismissing the instant action; and the clerk is hereby directed to enter judgment accordingly.

Dated: December 1, 2010

Arthur F. Engoron, J.C.C.

EXHIBIT 12

American Arbitration Association
New York No-Fault Arbitration Tribunal

37508

In the Matter of the Arbitration between:

Optimum Chiropractic Health, P.C. / David Rosario (Applicant)	AAA Case No.	412011075977
	AAA Assessment No.	17991 42926 11
	Applicant's File No.	
- and -		
Geico Insurance Company (Respondent)	Insurer's Claim File No.	0252538730101023

ARBITRATION AWARD

I, Howard D. Jacob, Esq., the undersigned arbitrator, designated by the American Arbitration Association pursuant to the Rules for New York State No-Fault Arbitration, adopted pursuant to regulations promulgated by the Superintendent of Insurance, having been duly sworn, and having heard the proofs and allegations of the parties make the following **AWARD:**

Injured Person(s) hereinafter referred to as:Eligible Injured Person

1. Hearing(s) held on
☒02/02/12
and declared closed by the arbitrator on 3/6/12.

Lee Odierno, Esq. participated in person for the Applicant.
Law Offices of Short & Billy, by Mark Puleo participated in person for the Respondent.

2. The amount claimed in the Arbitration Request, **$1,310.94**, was NOT AMENDED at the oral hearing.

STIPULATIONS were not made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

The issue in this arbitration is the Applicant's unpaid bill for electrodiagnostic testing. The Respondent raised a Section 238-a defense.

4. Findings, Conclusions, and Basis Therefor

The Applicant brought this arbitration proceeding to obtain payment of $1,310.94 for upper extremity pf-NCS testing done on March 16, 2010. The conciliation submissions of both parties were made part of the record, as well as their post-hearing briefs.

The Respondent raised a prohibited referral defense based on Section 238-a. Section 238-a(1)(a) reads as follows:

> A practitioner authorized to order clinical laboratory services, pharmacy services, radiation therapy services, physical therapy services or x-ray or imaging services, may not make a referral for such services to a health care provider authorized to provide such services where such practitioner or immediate family member of such practitioner has a financial relationship with such health care provider.

Section 238-a(1)(b) reads as follows:

> A health care provider or a referring practitioner may not present or cause to be presented to any individual or third-party payor or other entity a claim, bill, or other demand for payment for clinical laboratory services, pharmacy services, radiation therapy services, physical therapy services or x-ray or imaging services furnished pursuant to a referral prohibited by this subdivision.

The health insurance claim form indicates that Dr. Michael Genco was the referring provider and the testing took place at his facility.

On July 29, 2010, Dr. Christine Antoldi, the owner of Optimum Chiropractic Health, P.C., testified at an EUO. The pertinent part of her testimony reads as follows:

Q. Where do you do the test?
A. In doctor's offices.
Q. Do you do any in your own office?
A. I do.
Q. What percent do you do in your office?
A. I want to say two percent.
Q. So most of them are done in someone else's offices; correct?
A. Yes.
Q. How many different offices do you use?
A. I use –right now there are three different offices. There used to be two others but I am not currently testing in those offices.
Q. Which two did you stop testing in?
A. Dr. Whyte and Dr. Macagnone.
In Dr. Macagnone's office I am not testing right now but I rent space there and it's just been very, very quiet.
Q. So there haven't been enough referrals; correct?
A. Anywhere.
Q. Do you have a lease agreement with each of these offices?
A. I do not.
MR. EISENBERG: Do you mean in writing or a verbal agreement?
MR. SHORT: Either.
A. In verbal, yes.
Q. Do you have a written agreement?

A. No.
Q. Have you ever had a written agreement for any of these offices?
A. No.
Q. What is the substance of the oral agreements?
A. The substance is I pay a monthly fee to rent space in the office.
Q. How much are the fees?
A. It's different in the offices.
Q. How much for each office?
A. Dr. Wright is $600 per month and Dr. Picard is $800 per month.
Q. Anyone else?
A. Well, Dr. Macagnone was $400 per month.
Q. Does Dr. Genco make referrals?
A. He does.
Q. How much is he a month?
A. Him it's different. We are in the same office. I don't pay him rent to do the testing.
Q. Do you have other financial transactions with him?
A. I work as his employee right now. I am an employee of his and eventually I would like to be his partner. I am working towards being his partner.

Counsel for the Applicant argued in his brief as follows:

> The EUO testimony of Dr. Antoldi which is the entire basis of the Respondent's claim is absent any information or testimony that at the time the medical services were rendered, she was in violation of the Public Health Law. The Respondent had ample opportunity to ask additional questions or request information but failed to so; their allegations based upon the responses to their limited questions are merely assumptions and are not substantiated facts.

Counsel also cited 10 NYCRR 34-1.7 that provides for exceptions to compensation arrangement prohibitions. Section 34-1.7(b) reads as follows:

> The following shall not be considered to be compensation arrangements subject to Public Health Law section 238-a(1)(a) or to Section 34-1.3 of this Subpart:
> (b) bona fide employment relationships: Any amount paid by an employer to a physician (or an immediate family member of such physician) who has a bona fide employment relationship with the employer for the provision of services, if:
> (1) the employment is for identifiable services;
> (2) the amount of the remuneration under the employment
> (i) is consistent with fair market value of the services; and
> (ii) is not determined in a manner that takes into account (directly or indirectly) the volume or value of any referrals by the referring physician; and
> (3) the remuneration is provided pursuant to an agreement which would be commercially reasonable even if no referrals were made to the employer. Subparagraph (2)(ii) shall not prohibit the payment of

> remuneration in the form of a productivity bonus based on services performed personally by the physician (or an immediate family member of such physician).

Counsel for the Respondent argued as follows in his brief:

> Nowhere in her testimony does she indicate that Dr. Antoldi's or Optimum's business relationship with Dr. Genco was any different at any point in time, even though the 3-16-10 bill regarding services for the assignor was marked as an exhibit at the 7-29-10 EUO (see copy of that EUO exhibit herein as exhibit "E"). Dr. Antoldi never testified or claimed that she was not an employee of Dr. Genco when the 3-16-10 test was administered to the assignor. Applicant's belated attempt to deny the employment status of Dr. Antoldi has no factual basis, since Applicant never submitted any rebuttal affidavit from Dr. Antoldi on this issue despite having GEICO's submission for several months before the February 2, 2012 hearing before Arbitrator Jacob.

I have considered the arguments of counsel. I find that it was implicit in Dr. Antoldi's testimony that she was an employee of Dr. Genco on the date that the testing was done. If it were otherwise, the Applicant could have testified at this arbitration hearing or submitted an affidavit to that effect. Absent any evidence from the Applicant on this issue, I draw a negative inference. As to the exception raised by the Applicant's counsel under 10 NYCRR 34-1.7, I find that the burden of proof on the exception would rest with the Applicant. No evidence was submitted by the Applicant on this issue either. The Section 238-a defense is sustained.

5. Optional imposition of administrative costs on Applicant.
Applicable for arbitration requests filed on and after March 1, 2002.

I do NOT impose the administrative costs of arbitration to the applicant, in the amount established for the current calendar year by the Designated Organization.

Accordingly, the claim is DENIED in its entirety.

This award is in full settlement of all no-fault benefit claims submitted to this arbitrator.

State of New York
SS :
County of Nassau.

I, Howard D. Jacob, Esq., do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

3/20/12
(Dated)

Howard Jacob
(Howard D. Jacob, Esq.)

IMPORTANT NOTICE

This award is payable within 30 calendar days of the date of transmittal of award to parties.

This award is final and binding unless modified or vacated by a master arbitrator. Insurance Department Regulation No. 68 (11 NYCRR 65-4.10) contains time limits and grounds upon which this award may be appealed to a master arbitrator. An appeal to a master arbitrator must be made within 21 days after the mailing of this award. All insurers have copies of the regulation. Applicants may obtain a copy from the Insurance Department.

American Arbitration Association
New York No-Fault Arbitration Tribunal

37467

In the Matter of the Arbitration between:

Optimum Chiropractic Health, P.C. / James Montelone (Applicant)	AAA Case No.	412011076104
	AAA Assessment No.	17 991 42964 11
	Applicant's File No.	
- and -		
Geico Insurance Company (Respondent)	Insurer's Claim File No.	0175691480101026

ARBITRATION AWARD

I, Howard D. Jacob, Esq., the undersigned arbitrator, designated by the American Arbitration Association pursuant to the Rules for New York State No-Fault Arbitration, adopted pursuant to regulations promulgated by the Superintendent of Insurance, having been duly sworn, and having heard the proofs and allegations of the parties make the following **AWARD:**

Injured Person(s) hereinafter referred to as:Eligible Injured Person

1. Hearing(s) held on
☒02/02/12
and declared closed by the arbitrator on 3/6/12.

Lee Odierno, Esq. participated in person for the Applicant.
Law Offices of Short & Billy, by Mark Puleo participated in person for the Respondent.

2. The amount claimed in the Arbitration Request, **$2,330.56**, was NOT AMENDED at the oral hearing.

STIPULATIONS were not made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

The issues in this arbitration are the Applicant's unpaid bills for electrodiagnostic testing, denied based on an IME. In addition, the Respondent raised a prohibited referral defense based on Section 238-a of the Public Health Law.

4. Findings, Conclusions, and Basis Therefor

The Applicant brought this arbitration proceeding to obtain payment of $2,330.56 for upper extremity pf-NCS testing done on March 24, 2010 and lower extremity pf-NCS testing done on April 21, 2010. The conciliation submissions of both parties were made part of the record, as well as their post-hearing briefs.

The Respondent raised a prohibited referral defense based on Section 238-a of the Public Health Law. Section 238-a(1)(a) reads as follows:

> A practitioner authorized to order clinical laboratory services, pharmacy services, radiation therapy services, physical therapy services or x-ray or imaging services, may not make a referral for such services to a health care provider authorized to provide such services where such practitioner or immediate family member of such practitioner has a financial relationship with such health care provider.

Section 238-a(1)(b) reads as follows:

> A health care provider or a referring practitioner may not present or cause to be presented to any individual or third-party payor or other entity a claim, bill, or other demand for payment for clinical laboratory services, pharmacy services, radiation therapy services, physical therapy services or x-ray or imaging services furnished pursuant to a referral prohibited by this subdivision.

The health insurance claim forms indicate that the referring provider was Dr. Steven Macagone and the testing took place at his facility.

On July 29, 2010, Dr. Christine Antoldi, the owner of Optimum Chiropractic Health, P.C., testified at an EUO. The pertinent part of her testimony reads as follows:

Q. Where do you do the test?
A. In doctor's offices.
Q. Do you do any in your own office?
A. I do.
Q. What percent do you do in your office?
A. I want to say two percent.
Q. So most of them are done in someone else's offices; correct?
A. Yes.
Q. How many different offices do you use?
A. I use –right now there are three different offices. There used to be two others but I am not currently testing in those offices.
Q. Which two did you stop testing in?
A. Dr. Whyte and Dr. Macagnone.
In Dr. Macagnone's office I am not testing right now but I rent space there and it's just been very, very quiet.
Q. So there haven't been enough referrals; correct?
A. Anywhere.
Q. Do you have a lease agreement with each of these offices?
A. I do not.
MR. EISENBERG: Do you mean in writing or a verbal agreement?
MR. SHORT: Either.

A. In verbal, yes.

Q. Do you have a written agreement?
A. No.
Q. Have you ever had a written agreement for any of these offices?
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A. Dr. Wright is $600 per month and Dr. Picard is $800 per month.
Q. Anyone else?
A. Well, Dr. Macagnone was $400 per month.
Q. Does Dr. Genco make referrals?
A. He does.
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A. Him it's different. We are in the same office. I don't pay him rent to do the testing.
Q. Do you have other financial transactions with him?
A. I work as his employee right now. I am an employee of his and eventually I would like to be his partner. I am working towards being his partner.

Counsel for the Applicant argued in his brief as follows:

> The EUO testimony of Dr. Antoldi which is the entire basis of the Respondent's claim is absent any information or testimony that at the time the medical services were rendered, she was in violation of the Public Health Law. There is no indication that at the time the medical services were rendered, she was renting space from another medical provider. The Respondent had ample opportunity to ask additional questions or request information but failed to so; their allegations based upon the responses to their limited questions are merely assumptions and are not substantiated facts.

Counsel for the Respondent argued as follows:

> Nowhere in her testimony does she indicate that Optimum's business relationship with Dr. Macagnone was any different at any point in time. This testimony conclusively establishes that Optimum had a financial relationship with Dr. Macagnone during the time Optimum got referrals from Dr. Macagnone which included the 3-24-10 and 4-21-10 dates of service for the bills at issue.

Having considered the arguments of counsel, I find that it is implicit in Dr. Antoldi's testimony that this was her relationship with Dr. Macagnone at the time the services were rendered. If it were otherwise, the Applicant could have testified at this arbitration hearing or submitted an affidavit to that effect. Absent any evidence from the Applicant on this issue, I draw a negative inference. The Section 238-a defense is sustained.

5. Optional imposition of administrative costs on Applicant.
Applicable for arbitration requests filed on and after March 1, 2002.

I do NOT impose the administrative costs of arbitration to the applicant, in the amount established for the current calendar year by the Designated Organization.

Accordingly, the claim is DENIED in its entirety.

This award is in full settlement of all no-fault benefit claims submitted to this arbitrator.

State of New York
SS :
County of Nassau.

I, Howard D. Jacob, Esq., do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

Howard Jacob

3/20/12
(Dated)

(Howard D. Jacob, Esq.)

IMPORTANT NOTICE

This award is payable within 30 calendar days of the date of transmittal of award to parties.

This award is final and binding unless modified or vacated by a master arbitrator. Insurance Department Regulation No. 68 (11 NYCRR 65-4.10) contains time limits and grounds upon which this award may be appealed to a master arbitrator. An appeal to a master arbitrator must be made within 21 days after the mailing of this award. All insurers have copies of the regulation. Applicants may obtain a copy from the Insurance Department.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

CAMBRIDGE MEDICAL, P.C.,

Case No:
2:11-cv-04044-LDW-ETB

Plaintiff,

-against-

ALLSTATE INSURANCE COMPANY, et al.

Defendant,

----------X

ALLSTATE INSURANCE COMPANY, et al.

Defendants and Third Party Plaintiffs

-against-

PINE HOLLOW MEDICAL, P.C., et al.,

Third Party Defendants.

----------X

DEFENDANTS' AND THIRD PARTY PLAINTIFFS' ATTORNEY'S AFFIRMATION IN OPPOSITION TO PLAINTIFF AND THIRD-PARTY DEFENDANTS' MOTION TO DISMISS

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